In the Supreme Court
OF THE
United States

OCTOBER TERM, 1944

No. 70

In the Matter of the Application of
MITSUYE ENDO
for a Writ of Habeas Corpus.

MITSUYE ENDO,
Appellant,

vs.

MILTON EISENHOWER, Director of War Relocation Authority and Wartime Civilian Control Administration, et al.,
Appellees.

OPENING BRIEF FOR APPELLANT.

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OPENING BRIEF FOR APPELLANT.

JURISDICTION.

This is an appeal from a judgment denying appellant's petition for a writ of habeas corpus (R. 2-10.) made by the District Court for the Northern District of California and entered July 2, 1943. (R. 15-16.)

The Federal District Court had jurisdiction of the cause under 28 U.S.C.A., Section 451.

The Circuit Court of Appeals had jurisdiction of the appeal under 28 U.S.C.A., Sections 225 and 463.

This case now comes before the Supreme Court of the United States upon a certificate to the Supreme Court of questions of law, upon which the Circuit Court of Appeals desires instructions for the proper disposition of the cause.

The Supreme Court should bear in mind during its consideration of the case the pertinent statute reading as follows:

> "*Summary hearing; disposition of party.*—The Court or justice or judge shall proceed in a summary way to determine the facts of the case by hearing the testimony and arguments and thereupon to dispose of the party as law and justice require."
>
> Fed. Code Ann., Title 28, Sec. 461.

As was pointed out by the Supreme Court in *Storti v. Massachusetts*, 183 U. S. 138, 46 L. ed. 120,

> "that mandate is applicable to this court whether it is exercising its original or appellate jurisdiction. Proceedings in habeas corpus are to be disposed of in a summary way * * * The command of the section is 'to dispose of the party as law and justice require'. All the freedom of equity procedure is thus prescribed and substantial justice promptly administered is ever the rule in habeas corpus."

This Court has also held: "The validity of a detention questioned by petition for a writ of habeas corpus

is to be determined by the condition existing at the time of the final decision thereon.

See:

Mensevich v. Tod, 264 U. S. 134, 136.

QUESTION INVOLVED.

The issue before the Court is well stated by appellees to be **"whether it is valid to confine persons who are not suspected of crime or of any culpable conduct or characteristics or of any proclivity or intention to harm the United States, on the ground that their release might for other reasons occasion situations which would adversely affect the prosecution of the war".** (Appellees' Brief in Circuit Court, p. 32.)

STATEMENT OF CASE.

Mitsuye Endo, the appellant, was born about twenty-four (24) years ago in the State of California and derives citizenship from her birth in the United States, subject to the jurisdiction thereof.

See:

U. S. Constitution—14th Amendment, Sec. 1;
U. S. v. Wong Kim Ark, 169 U. S. 649;
Soo Hoo Yee v. U. S., 3 Federal (2d) 592;
Regan v. King, 134 Federal (2d) 413.

On December 7, 1941, when Pearl Harbor was attacked, Miss Endo resided in Sacramento, California, where she was employed by the State of California as a permanent Civil Service employee.

Following this attack on Pearl Harbor, and the declaration that a state of war existed, President Roosevelt issued a series of proclamations.

Proclamations 2526-2527-2528, issued December 8, 1941, respectively enjoined German, Italian and Japanese aliens to preserve the peace and to comply with regulations to be promulgated.

These proclamations were issued by the President under the authority vested in him by the Alien Enemy Act, 50 U.S.C.A. 21. (HR 2124, 77th Congress, 2nd Session, May 1942, pages 294-300.)

The President gave to the Attorney General power to set up zones, and establish restrictions therein upon the activities of alien enemies. (HR 2124, pages 302-314.)

Executive Order 9066 (see Appendix A) was issued by the President February 19, 1942, authorizing military commanders to prescribe military areas from which any or all persons might be excluded and with respect to which said military commander might impose in his discretion restrictions on any persons entering, leaving or remaining therein.

This Executive Order 9066 also authorized the Secretary of War to make provisions for transportation, feeding and sheltering residents excluded from such areas.

In issuing Executive Order 9066, the President purported to be acting to provide for protection against espionage and sabotage to national defense material, premises and utilities.

Executive Order 9102 (see Appendix B), issued March 21, 1942, established the War Relocation Authority and was issued to provide for the removal from restricted areas of persons whose removal was necessary in the interest of national security, and to provide for their subsequent relocation maintenance and supervision.

The same day, Public Law 503 (see Appendix C) became effective, making it a misdemeanor to do anything in a military area contrary to the restrictions applicable to the military area or contrary to the order of the military commander. (This specifically included entering, remaining in, or leaving the military area.)

Prior to the passing of this law, no intimation had been given, so far as is known, that the mass transportation of American citizens to concentration camps was contemplated.

Starting on March 27, 1942, General De Witt promulgated a series of Public Proclamations restricting the rights of American citizens of Japanese ancestry, to be abroad at certain times, to possess certain articles of personal property such as binoculars, cameras, radio short wave sets, and finally as a result of one of this series of proclamations of General DeWitt, Miss Endo was required to report with certain limited personal effects to a barbed wire stockade, guarded by armed soldiers, euphemistically termed a Civilian Assembly Center, where she was confined under armed guard some 10 or 15 miles from Sacramento, California, her home.

(See Appendix D for copy of Public Proclamation No. 8, dated June 27, 1942.)

Still later she was shipped—under guard—to a concentration camp known as Tule Lake War Relocation Center, near the Oregon border in Modoc County, California.

Still later, Miss Endo was banished from California entirely to another concentration camp located in Topaz, Utah, where she is presently confined, still under armed guard.

On February 19, 1943, Mitsuye Endo, the appellant herein, filed in the Southern Division of the District Court of the United States for the Northern District of California, her petition for a writ of habeas corpus (Tr. pp. 2-7), alleging that she was born May 10, 1920, at Sacramento, California; that she was at the time of her birth, and ever since has been, subject to the jurisdiction of the United States of America, and of no other country, and that she has been and now is a loyal citizen of the United States of America and owes allegiance to no other country, and is a citizen of no country.

It is further alleged that her brother is a soldier, serving in the Military Forces of the United States.

The petition proceeds to allege that appellant is confined at a concentration camp located at Newell, Modoc County, California, and within the jurisdiction of the District Court, and that she is confined in said concentration camp under armed guard, and that she is detained there against her will.

The petition alleges, on information and belief, that appellant is confined, detained and imprisoned in said concentration camp by Milton Eisenhower, Director of the War Relocation Authority and the Director of the War-Time Civilian Control Administration, and that said confinement and said imprisonment are maintained in accordance with the orders of J. L. DeWitt, Lieutenant General of the United States Army, commanding Military Area Number One, and Colonel Carl R. Bendetsen, Assistant Chief of Staff, Southwestern Defense Command of the Fourth Army, and certain subordinate officials of the War Relocation Authority in charge of the said concentration camp.

The petition further alleges that the sole reason for the detention of appellant is that she is an American citizen of Japanese ancestry, and that she has been imprisoned without any process or color of law whatsoever; that none such is pretended by those detaining her; that your petitioner alleges that no warrant or process of any court, magistrate, or any person having legal authority to issue the same exists to justify said arrest and imprisonment, but, to the contrary, the imprisonment, as above stated, has been without color of law and in violation of the Constitution and Laws of the United States of America, of which she is a citizen; that no charge has ever been made against said petitioner; that petitioner has never been informed of any other reason for which she is being held; that no hearing has ever been granted to said petitioner; that said petitioner is not, and never has been, a member of the

Military Forces of the United States, and is not subject to Military Law; (1) that Martial Law has not been declared; (2) that all the courts in and of the State of California are open and sitting and available to any party charging petitioner with crime or wrongdoing."

It is further alleged that in October, 1941, petitioner became a probationary Civil Service employee of the State of California; that thereafter, for a period of six months during said probationary period, the officials of the State of California investigated petitioner's qualifications for her petition as a Civil Service employee and investigated her efficiency and honesty and moral responsibility, and certified her as a permanent Civil Service employee of the State of California; and that on or about April 7, 1942, the Personnel Board of the State of California suspended petitioner from her position as a State employee for the reason that she was subject to being evacuated and would be unable to perform the duties of her position.

The District Court issued no writ or other process to the appellee, or to any of the other persons alleged in the position as responsible for appellant's detention.

The Court did not even issue an order to show cause why a writ of habeas corpus should not issue.

However (this is not shown by the *Transcript* and is not a part of the *Record*), the District Court heard arguments by counsel for the petitioner and the Government, and permitted the filing of briefs by counsel

for petitioner, by the United States attorney, by the Attorney General of the State of California as *Amicus Curiae* in opposition to the issuance of the Writ, and by counsel for the American Civil Liberties Union in support of its issuance.

Thereafter, and on July 2, 1943, the Judge of the District Court who heard the matter made the following order:

> "In the above-entitled cause, it appearing upon the face of the petition that petitioner is not entitled to a Writ of Habeas Corpus; and
>
> It further appearing that she has not exhausted her administrative remedies under the provisions of Executive Order No. 9,102 (7 Fed. Reg. 2165) and the regulations promulgated thereunder;
>
> It is therefore ordered that the petition for a Writ of Habeas Corpus be, and the same is hereby denied." (Tr. p. 15.)

During the course of her incarceration, after her petition for writ of habeas corpus was filed in the District Court on February 19, 1943, Miss Endo made an application for leave clearance.

Thereafter under the date of October 16, 1943, a conditional leave clearance was granted by the director. (See Appendix E.)

N.B. 1. For copy of Notice of Action on application for leave clearance see Appendix F.

2. For copy of application for indefinite leave see Appendix G.

3. For excerpts from regulations governing issuance of leave for departure from a relocation area—see Appendix H.

THE PRESIDENTIAL PROCLAMATIONS ARE AN ASSUMPTION OF DESPOTIC POWERS BY THE EXECUTIVE.

Few public acts of such importance and so vitally affecting every citizen and resident of the United States, have ever been so generally misunderstood as the proclamations of President Roosevelt, conferring upon his military commanders the power of evacuation and detention of persons within their respective military zones.

It has been generally thought that the proclamations applied solely to the states bordering upon or adjacent to the Pacific Ocean and related to persons of Japanese ancestry alone.

On the contrary, they affect every foot of American soil and every person, or citizen or alien.

As was stated by counsel at the argument in the Court below, the presidential proclamations could be invoked as authority for the removal from California and the imprisonment in a concentration camp of the attorney who presented the petition in this cause and the federal judge who allowed him to be heard.

Any American citizen of Japanese ancestry who gives aid or comfort to the enemies of the United States can be indicted and put upon trial for treason, and, if found guilty, can be adjudged to suffer the

death penalty. The *Stefan* and the *Haupt* cases furnish sufficient evidence that the Federal Courts are not remiss in their duty, and, in cases of treason or espionage, have not erred on the side of clemency. The preservation of the liberty of a citizen and the maintenance of constitutional rights, even in time of war, are just as important as the defeat of the enemy; otherwise, to use the eloquent words of Mr. Justice Davis in *Ex parte Milligan, supra:*

> "It could well be said that a country preserved at the sacrifice of all of the cardinal principles of liberty, is not worth the cost of preservation. Happily, it is not so."

The sole basis, the only alleged legal justification for the presidential proclamations, is found in the so-called *Alien Enemy Act*, approved July 6, 1798; yet, startling as it may seem, the proclamations do not apply solely to alien enemies, or other aliens. Under the all-devouring provisions of the first proclamation, the Secretary of War or any designated military commander may prescribe areas, "from which *any* or *all persons* may be excluded". (*Executive Order No. 9066.*)

The second proclamation (Exec. Order 9102) authorizes the War Relocation Authority to accomplish the evacuation of any person excluded by the military commander, provide for the relocation of such persons in appropriate places, provide for their needs in such manner as may be appropriate, and supervise their activities. To state the matter otherwise, the commanding general and the War Relocation Authorities

are given unlimited license and discretion to remove any person, whether white or black or yellow, whether citizen or alien—even the most loyal and patriotic American, from the locality where he may have had his home for years, where he may have built up a flourishing and lucrative business, where he may be engaged in the practice of law or medicine, or some other useful and honorable profession, *and transfer him to a concentration camp which, however comfortable and however humanely conducted, is, nevertheless, a place of imprisonment, because he cannot leave it without the consent of the director of the War Relocation Authority.*

It is apparent at first blush that the President in these executive orders, has applied to citizens of the United States restraints that can only be constitutionally and lawfully applied to alien enemies.

No such despotic power has ever been claimed by the President of the United States.

If, under the pretext of a war emergency, he may deprive a citizen of his liberty, he may likewise deprive him of his life. To hold that the Executive possesses such a power would be a monstrous doctrine; yet, it is the very power that the President has assumed and has attempted to delegate to his military commanders.

THE MEANING OF THE PHRASE "DUE PROCESS OF LAW" IS THAT THE LAW HEARS BEFORE IT CONDEMNS AND THAT NO PERSON CAN BE DEPRIVED OF A RIGHT WITHOUT A HEARING OR AN OPPORTUNITY TO BE HEARD, OR BE IMPRISONED WITHOUT A TRIAL.

It should not be, but apparently it is, necessary to state that the phrase "due process of law" apparently used for the first time in the reign of Henry III, is synonymous with the provision of the Magna Charta, that "no freeman shall be disseised, or imprisoned, or put to death; we will not set upon him, neither will we go forth against him, *nisi per legale judicium parium suorum vel per legem terrae*" (save by the lawful judgment of his peers and the law of the land). By the "law of the land", is most clearly intended the general law, "a law which hears before it condemns, which proceeds upon inquiry and which renders judgment only after trial."

Mott v. Georgia State Board of Examiners, 148 Ga. 55, 95 S. E. 867;

Argument of *Daniel Webster* in the *Dartmouth College Case*, 4 Wheat. 518, 4 L. Ed. 629.

The essential elements of due process of law are notice and opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case before a tribunal having jurisdiction of the cause.

Ex parte Wall, 107 U. S. 265, 27 L. Ed. 552, 27 L. Ed. 569;

12 *Am. Jur.* 267, and cases cited in footnote.

In *Pierce v. Superior Court*, 1 Cal. (2d) 759, 37 Pac. (2d) 453, it was held that the Court had no jurisdiction to enter a decree cancelling alleged fraudulent

registration of voters who had not been regularly served with summons and had not personally appeared in the action.

In the earlier case of *McClatchy v. Superior Court*, 119 Cal. 413, 51 Pac. 696, the Court holds that in order to constitute due process of law the party proceeded against must not only have notice, but must be accorded the right to make a defense and to produce evidence in his own behalf. The Court quotes with approval from *Hovey v. Elliott*, 167 U. S. 409, 42 L. Ed. 215, as follows:

> "Can it be doubted that due process of law signifies a right to be heard in one's defense? If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, could it be pretended that such an enactment would not be violative of the constitution? If this is true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which if done under the express legislative sanction would be violative of the constitution?
>
> If such power obtains, then the judicial department of the government, sitting to uphold and enforce the constitution, is the only one possessing a power to disregard it. If such authority exists, then, in consequence of their establishment to compel obedience to law and enforce justice, courts possess the right to inflict the very wrongs which they were created to prevent."

The Court also quotes from *Galpin v. Page*, 18 Wall. 350:

> "It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant until he has been duly cited to appear and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and can never be upheld where justice is administered."

If the judicial branch of the government may not deprive any person of his liberty without a trial; if the legislative branch of the government cannot constitutionally pass a law providing for imprisonment without a trial, how can the executive branch of the government provide for the arrest, removal and detention of citizens who have not only not been tried for any crime, but who have not even been charged?

Innumerable cases might be cited to the effect that Congress cannot delegate to the President the power to make rules and regulations, the violation of which is punishable as a crime, without laying down a clear and specific standard which the executive must follow in the formulation of such rules. Thus, in the case of *Panama Refining Co. v. Ryan*, 293 U. S. 288, the Supreme Court, holding unconstitutional certain provisions of the so-called National Recovery Act, says:

> "If the codes have standing as penal statutes, this must be due to the effect of the executive action. *But Congress cannot delegate legislative*

power to the President to exercise unfettered discretion to make whatever laws he thinks may be needed or advisable."

Later in the same opinion it is said that Congress may not delegate to the President *"the power to roam at will"*.

Powers which Congress may not delegate to the President may certainly not be assumed by the President himself. It seems absurd that one hundred and fifty-six years after the adoption of the Constitution, and in the light of the innumerable decisions of the Supreme Court of the United States, of the subordinate Federal Courts, and the courts of last resort of the several states, it should be necessary to argue that no citizen of this country, even in time of war, and, even if he be suspected of crime against, or disloyalty to the United States, can be taken from his home and business and restrained of his liberty without a trial, save in cases of actual insurrection or invasion, when the civil authorities are no longer able to perform their functions and the civil courts are unable to execute their process.

THE IMPRISONMENT AND DETENTION OF APPELLANT IS ILLEGAL UNDER THE RULES STATED IN EX PARTE MILLIGAN, WHICH HAS NEVER BEEN OVERRULED, AND WHICH HAS BEEN REPEATEDLY APPROVED.

Every lawyer of even ordinary learning is familiar with the *Milligan* case, supra. During the Civil War

great bitterness was aroused against citizens of the northern states, who had expressed opposition to the conduct of the war, or who were suspected of sympathy with the Confederate States. Even the great Lincoln was induced by some of his advisers to take various illegal and unconstitutional measures against persons who resided in states where there was neither insurrection nor invasion. Almost without exception, the Courts, both State and Federal, held the arrest and imprisonment of such persons by the military authorities unconstitutional and in excess of the powers of the executive. The first of these cases worthy of note is *Ex parte Merryman*, Taney 246, 17 Fed. Cas. 144, No. 9487. There the petitioner was arrested by the order of a military commander and imprisoned in Fort McHenry, Virginia. Chief Justice Taney, sitting in the Circuit Court, issued a writ of habeas corpus which the commander of the fort refused to obey. In the course of the opinion the Chief Justice says:

> "As the case comes before me, therefore, I understand that the president not only claims the right to suspend the writ of habeas corpus himself, at his discretion, but to delegate that discretionary power to a military officer, and to leave it to him to determine whether he will or will not obey judicial process that may be served upon him. No official notice has been given to the courts of justice, or to the public, by proclamation or otherwise, that the president claimed this power, and had exercised it in the manner stated in the return. And I certainly listened to it with some surprise, for I had supposed it to be one of those

points of constitutional law *upon which* there was no difference of opinion, and that it was admitted on all hands, *that the privilege of the writ could not be suspended, except by act of congress.*"

Discussing the nature of the presidential office and its powers, the opinion further proceeds:

"*He is not empowered to arrest any one charged with an offense against the United States, and whom he may, from the evidence before him, believe to be guilty; nor can he authorize any officer, civil or military, to exercise this power, for the fifth article of the amendments to the constitution expressly provides that no person 'shall be deprived of life, liberty or property, without due process of law'—that is, judicial process.*

Even if the privilege of the writ of habeas corpus were suspended by act of congress, and a party not subject to the rules and articles of war were afterwards arrested and imprisoned by regular judicial process, *he could not be detained in prison, or brought to trial before a military tribunal,* for the article in the amendments to the constitution immediately following the one above referred to (that is, the sixth article) provides, that 'in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense."

After a discussion of the nature of the writ of habeas corpus, and declaring that it may not be suspended by the President, Chief Justice Taney proceeds:

> "If the president of the United States may suspend the writ, then the constitution of the United States has conferred upon him *more regal* and *absolute power over the liberty of the citizen, than the people of England have thought it safe to entrust to the crown;* a power which the queen of England cannot exercise at this day, and which could not have been lawfully exercised by the sovereign ever in the reign of Charles the First."

He then proceeds to quote from two of his illustrious predecessors:

> "Mr. Justice Story, speaking, in his Commentaries, of the habeas corpus clause in the constitution, says: 'It is obvious that cases of a peculiar emergency may arise, which may justify, nay, even require, the temporary suspension of any right to the writ. But as it has frequently happened in foreign countries, and even in England, that the writ has, upon various pretexts and occasions, been suspended, whereby persons apprehended upon suspicion have suffered a long imprisonment, sometimes from design, and sometimes because they were forgotten, *the right to suspend it is expressly confined to cases of rebellion or invasion, where the public safety may require it.* A very just and wholesome restraint, which cuts down at a blow a fruitful means of oppression, capable of being abused, in bad times, to the worst of purposes. Hitherto, no suspension of the writ has ever been authorized by congress,

since the establishment of the constitution. It would seem, as the power is given to congress to suspend the writ of habeas corpus, in cases of rebellion or invasion, that the right to judge whether the exigency had arisen must exclusively belong to that body.' 3 Story, Comm. Const. §1336.

And Chief Justice Marshall, in delivering the opinion of the supreme court in the case of Ex parte Bollman and Swartout, uses this decisive language, in 4 Cranch (8 U. S.) 95: 'It may be worthy of remark, that this act (speaking of the one under which I am proceeding) was passed by the first congress of the United States, sitting under a constitution which had declared "that the privilege of the writ of habeas corpus should not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it". Acting under the immediate influence of this injunction, they must have felt, with peculiar force, the obligation of providing efficient means, by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted. Under the impression of this obligation, they give to all the courts the power of awarding writs of habeas corpus.' And again on page 101: 'If at any time, the public safety should require the suspension of the powers vested by this act in the courts of the United States, it is for the legislature to say so. That question depends on political considerations, on which the legislature is to decide; until the legislative will be expressed, this court can only see its duty, and must obey the laws.' I can add nothing to these clear and emphatic words of my great predecessor."

The opinion concludes with words which apply with the fullest force to the case at bar:

> "'The constitution provides, as I have before said, that 'no person shall be deprived of life, liberty or property, without due process of law.' It declares that 'the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.' It provides that the party accused shall be entitled to a speedy trial in a court of justice.
>
> "'These great and fundamental laws, which Congress itself could not suspend, have been disregarded and suspended, like the writ of habeas corpus, by military order, supported by force of arms. Such is the case now before me, and I can only say that *if the authority which the constitution has confided to the judiciary department and judicial offices, may thus, upon any pretext or under any circumstances, be usurped by the military power, at its discretion, the people of the United States are no longer living under a government of laws, but every citizen holds life, liberty and property at the will and pleasure of the army officer in whose military district he may happen to be found.*"

In view of the fact that the United States Marshal for the District of Maryland was unable to execute the attachment for contempt issued against the Commander of Fort McHenry for disobedience to the writ of habeas corpus, the Chief Justice directed

that the record, together with his opinion, be transmitted to the President of the United States, to the end that he might exercise his constitutional duty to take care that the laws of the United States were faithfully enforced.

Judges of the state courts took the same position in regard to the arrest and imprisonment of civilians as Chief Justice Taney, and two of these opinions are outstanding. *Griffin v. Wilcox*, 21 Ind. 370, was an action brought against a Captain in the Federal Army, who was a Deputy Provost Marshal, for the false imprisonment of the plaintiff pursuant to an order issued by his superior officer, prohibiting the sale of liquor to enlisted men. The lower court held that the order issued by his superior officer was a justification for the imprisonment and was a bar to the suit for damages. Reversing the judgment of the lower Court, the Supreme Court of Indiana says (at p. 375):

> "Griffin was not arrested and imprisoned under the civil law of this State, nor of the United States, for he had violated no such law. There is no act of Congress, nor of the State Legislature, prohibiting the sale of liquor to an enlisted soldier. The only law in this State, containing such prohibition, when Griffin made his sale to a soldier, was that enacted by the military order of Major Lyon. Griffin was arrested, then, by military authority. Could he be legally arrested, for the cause alleged for his arrest, by that authority, in the place, and at the time it was so made?
>
> Griffin was not connected with the military or public service, was not a spy from the enemy, and was not within military lines. *He was a citizen of*

the State, pursuing, lawfully, his lawful vocation, in the civil walks of life. Had he been a soldier, in the service, he would have been subject to the well defined code of military law, which requires obedience by soldiers to the orders of their officers, and subjects them to punishment, by such officers, in prescribed modes, for disobedience to these orders. In this case, had Major Lyon addressed his order to the soldiers subject to his command, forbidding them to drink intoxicating liquor, or to leave the lines to go where it could be obtained, and the soldiers, subject to his jurisdiction, had disobeyed his order, he might, perhaps, though the point is not now before us for decision, have caused them to be punished by military law. Military men, in the service, are subject to the code of military law, enacted for their government, and to be enforced, in prescribed modes, by military officers. So, legislative bodies administer the *lex parliamentaria*—the law governing legislatures. It is a special law for such bodies. But, as a general proposition, *the citizen, in the civil walks of life, is not subject to military orders,* nor to the *lex parliamentaria,* nor to punishment by military or parliamentary law. He is governed by the law of the land, administered in the Courts of Justice."

The opinion reviews the decisions and writings of learned authorities on military law, quoting the celebrated passage from *Coke:*

"When the courts of justice be open, and the judges and ministers of the same may by law protect men from wrong and violence, and distribute justice to all, it is said to be time of peace. So

> when by invasion, insurrection, rebellion or such like, the peaceable course of justice is disturbed and stopped, so as the courts be as it were shut up, *et silent inter leges armà*, then it is said to be time of war."

An even more elaborate discussion of the right of military authorities to imprison and detain civilians in a district in which the civil courts are functioning and the civil authority unopposed is found in *In Re Kemp*, 16 Wis. 382. Each of the three justices of the Supreme Court of Wisconsin wrote a separate opinion which merits quotation in its entirety, but owing to the limitations placed upon the length of briefs by the Rules of this Court, we can do no more than summarize the conclusions reached as set forth in the *syllabus:*

> "The power of suspending the writ of *habeas corpus* under the first section of art. IX of the constitution of the United States, is a legislative power, and is vested in congress, and the president has no power to suspend the privilege of the writ of *habeas corpus* within the sense of that section of the constitution.
>
> "The powers of the president as commander-in-chief of the army and navy in time of war are strictly constitutional powers, and are derived from the authority of congress to carry on war, and though not defined by the constitution, yet they are limited by the laws and usages of nations, adopted in their full extent by the common law.
>
> "Martial law is restricted to and can exist only in those places which are the actual theatre of war and their immediate vicinity, and it cannot be

extended to remote districts, or those not immediately connected with the operations of the contending armies.

"If in time of civil war the civil authorities of a district are able by the ordinary process to preserve order and punish offenses and compel obedience to the laws, martial law does not exist there, and the military commander has no jurisdiction; but if, owing to the disloyalty of magistrates or the insurrectionary spirit of the people, the laws cannot be enforced and order maintained, then martial law takes the place of civil law in such district, wherever there is sufficient military force to execute it.

"The president has no power to prescribe offenses, or to make rules for the conduct of citizens in districts not subject to martial law, and enforce them by fines or other punishment by any form of trial whatever.

"A citizen not in the land or naval service, nor in the militia in the active service of the United States, who discourages volunteer enlistments or forcibly resists a militia draft, cannot be punished therefor by a court martial or military commission."

The full court reached the conclusion that the proclamation of President Lincoln dated September 24, 1862, suspending the privilege of the writ of habeas corpus was not a legal and valid exercise of executive power under the Constitution, and was void. During the course of the Civil War, there were many other flagrant invasions of constitutional rights, including the suppression of newspapers opposed to the adminis-

tration. One of these had a tragic aspect. After the assassination of President Lincoln and the death of his actual assassin, seven persons accused of complicity in the crime were brought to trial before a military commission, sitting in the District of Columbia, where the civil courts were open and had been functioning without interruption during the entire period of the conflict. Four of these, including a woman, were sentenced to be hanged. The District Judge of the District of Columbia issued a writ of habeas corpus for Mrs. Surratt, which General Hancock, the Military Commander in the District, acting under the instructions of the President, refused to obey, and the sentence was carried out.

Two of the other alleged conspirators were ably defended by General Ewing, a brother-in-law of General Sherman who was a brave officer and a skillful lawyer, and who challenged the jurisdiction of the commission with the words: "Gentlemen, you are no better than Judge Lynch". It may be stated, in passing, that practically all historians agree that Mrs. Surratt was innocent. This was even conceded—in fact, vociferously declared by General Butler—who, as counsel for the Government in the *Milligan* case, went to the extreme in defending military commissions, but who, on the floor of the House of Representatives, directly charged Bingham, the Judge Advocate at the trial, with having procured the execution of an innocent woman. (See: *DeWitt's Assassination of Lincoln.*)

In the following year, *Ex Parte Milligan* was decided. The history of the case and the decision of the

Court are familiar to everyone who has even a smattering of constitutional law. No Court, even in these days, has had the temerity to overrule its authority, and any attempt to distinguish it is futile.

The highest Court in the land there settled once and for all, the proposition that a military commission has no jurisdiction to try and sentence one not a resident of an enemy state, nor a prisoner of war, but a citizen who was never in the military or naval service, in a state where federal authority was always unopposed, and its Courts always open to hear criminal accusations and redress grievances, and that no usage of war could sanction a military trial for any offense whatsoever of a citizen in civil life in nowise connected with the military service. Congress, the Court holds, could grant no such power. The following language of Mr. Justice Davis, has been so often quoted that it has become classic:

> "No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people; for it is the birthright of every American citizen when charged with crime, to be tried and punished according to law. The power of punishment is alone through the means which the laws have provided for that purpose, and if they are ineffectual there is an immunity from punishment, no matter how great an offender the individual may be, or how much his crimes may have shocked the sense of justice of the country, or endangered its safety. By the protection of the law human rights are secured; withdraw that protection and they are at the mercy of wicked rulers, or the clamor of an ex-

cited people. If there was law to justify this military trial, it is not our province to interfere: if there was not, it is our duty to declare the nullity of the whole proceedings. The decision of this question does not depend on argument or judicial precedents, numerous and highly illustrative as they are. These precedents inform us of the extent of the struggle to preserve liberty and to relieve those in civil life from military trials. The founders of our government were familiar with the history of that struggle; and secured in a written Constitution every right which the people had wrested from power during a contest of ages. By that Constitution and the laws authorized by it, this question must be determined. The provisions of that instrument on the administration of criminal justice are too plain and direct to leave room for misconstruction or doubt of their true meaning. Those applicable to this case are found in that clause of the original Constitution which says 'that the trial of all crimes, except in case of impeachment, shall be by jury:' and in the fourth, fifth and sixth articles of the amendments. The fourth proclaims the right to be secure in person and effects against unreasonable search and seizure; and directs that a judicial warrant shall not issue 'without proof of probable cause supported by oath or affirmation'. The fifth declares that 'no person shall be held to answer for a capital or otherwise infamous crime unless on presentment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor be deprived of life, liberty, or property, without due process of law'. And the sixth guarantees the right of trial by

jury, in such manner and with such regulations that with upright judges, impartial juries and an able bar, the innocent will be saved and the guilty punished. It is in these words: 'In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.' These securities for personal liberty thus embodied were such as wisdom and experience had demonstrated to be necessary for the protection of those accused of crime. And so strong was the sense of the country of their importance, and so jealous were the people that these rights, highly prized, might be denied them by implication that when the original Constitution was proposed for adoption it encountered severe opposition; and, but for the belief that it would be so amended as to embrace them, it would never have been ratified.

Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words, that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than seventy years, sought to be avoided. Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper, and that the

principles of constitutional liberty would be in peril, unless established by irreparable law. The history of the world had taught them that what was done in the past might be attempted in the future. **The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false;** for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority.

"Have any of the rights guaranteed by the Constitution been violated in the case of Milligan? And if so, what are they?

"Every trial involves the exercise of judicial power; and from what source did the Military Commission that tried him derive their authority? Certainly no part of the judicial power of the country was conferred on them; because the Constitution expressly vests it 'in one Supreme Court and such inferior courts as the Congress may from time time ordain and establish', and it is not pretended that the commission was a court ordained and established by Congress. They cannot justify on the mandate of the President; because he is controlled by law, and has his ap-

propriate sphere of duty, which is to execute, not to make, the laws; and there is no unwritten criminal code to which resort can be had as a source of jurisdiction."

Since the military authorities have no jurisdiction by virtue of a Presidential proclamation to *try* a civilian for an alleged offense in a district where the civil Courts are open, **how much less right have they to imprison a citizen without any trial at all**, when he is neither charged with, nor suspected of, any crime, and when his loyalty (as in this case), is not called into question?

THE EXISTENCE OF A STATE OF WAR DOES NOT SUSPEND CONSTITUTIONAL RIGHTS.

Ever since the decision in the *Milligan* case, the Courts have uniformly held that the existence of a state of war does not authorize the federal government to take private property without compensation, or to violate the due process of law clause contained in the fifth and fourteenth amendments. Thus, in *U. S. v. Cohen Grocery Co.*, 225 U. S. 81, 65 L. Ed. 516, Chief Justice White states the principle in the following language:

"We are of the opinion that the court below was clearly right in ruling that the decisions in this court indisputably establish the mere existence of a state of war could not suspend or change the operation upon the power of Congress of the guarantees and limitations of the fifth and sixth amendments as to questions such

as we are here passing upon. (Citing cases.) *It follows that in testing the operation of the Constitution upon the subject here involved, the question of the existence or non-existence of a state of war becomes negligible, and we put it out of view.*"

In *Schechter v. U. S.*, 95 U. S. 495, 79 L. Ed. 1570, Chief Justice Hughes says:

"Extraordinary conditions do not create or enlarge constitutional power. The Constitution established a national government with powers deemed to be adequate, as they have proved to be, **both in war and in peace, but these powers of the national government are limited by the constitutional grants.** Those who act under these grants **are not at liberty to transcend the imposed limits because they believe that more or different power is necessary.**"

These are comparatively recent utterances by the highest court in the land, and they reiterate the doctrine of the *Milligan* case. Earlier decisions, both before and after *Ex parte Milligan*, are to the same effect. Thus, in *In re Egan*, 8 Fed. Cas. No. 4304, the petitioner was tried before a military commission in South Carolina in November, 1865, for a murder committed in September of the same year, and was convicted and sentenced to imprisonment for life in the penitentiary in Albany, New York. Hostilities had terminated and the Confederate Armies had surrendered some seven months before the trial. The petitioner was discharged on habeas corpus by Justice Nelson of the Supreme Court of the United States,

sitting on Circuit. The Justice does not refer to the *Milligan* case, but he reaches the same conclusion as to the jurisdiction of the military authorities:

> "I think that the record fails to show any power on the part of the military officer over the alleged crime therein stated, or any jurisdiction of the military commission appointed by him to try the accused. No necessity for the exercise of this anomalous power is shown. For aught that appears, the civil courts of the State of South Carolina were in the full exercise of their judicial functions at the time of the trial as restored by the suppression of the rebellion some seven months previously, and by the revival of the laws and the reorganization of the state government, in obedience to, and in conformity with its constitutional duties to the federal union."

In the earlier case of *Mitchell v. Harmony*, 13 How. 115, 14 L. Ed. 75, the plaintiff, who was a trader during the war between the United States and Mexico, went into the adjoining provinces, which were in the possession of the military authorities of the United States, for the purpose of carrying on trade with the inhabitants, which was sanctioned by the executive branch of the government, and also by the Commanding Military Officer. His property was seized by the Commanding Officer upon the ground that he was trading with the enemy. Plaintiff subsequently brought an action of trespass against the officer in the Circuit Court of the United States for the Southern District of New York, and a verdict for the plaintiff was affirmed by the Supreme Court of the United

States, Chief Justice Taney using the following language:

> "There are, without doubt, occasions in which private property may lawfully be taken possession of or destroyed to prevent it from falling into the hands of the public enemy; and also where a military officer, charged with particular duty, may impress private property into the public service or take it for public use. Unquestionably in such cases the government is bound to make full compensation to the owner; but the officer is not a trespasser. But we are clearly of the opinion that in all of these cases **the danger must be immediate and impending; or the necessity urgent for the public service such as will not admit of delay, and where the action of the civil authorities would be too late** in providing the means which the occasion calls for. It is impossible to define the particular circumstances of danger or necessity in which this particular power may be lawfully exercised. **It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified.**"

Indeed, even in the case of alien enemies, the Courts have shown a disposition to accord to them, as long as they reside peaceably in this country, and give no aid or comfort to the enemy, the same rights that our own citizens possess, such as access to our Courts, save in cases where the litigation would, for some reason or other, interfere with the prosecution of the war. This is particularly true where the party involved, though a subject of the enemy country, has

resided within our territory for a long period of time, has been engaged in business in this country, has acquired a domicile here, and has acquired the status of a friendly alien. Thus, in *Ex Parte Kawato*, 316 U. S. 650, 63 S. Ct. 115, it is held as follows:

"(1) That the words 'enemy alien' as applied to a native of Japan who had become a resident of the United States three years before the outbreak of the war with Japan and who, at the outbreak of the war, was libelant in a proceeding in admiralty pending in the District Court, are merely a legal definition of his status because he was born in Japan, with which we are at war;

(2) That the early English Common Law rule barring all aliens from the courts has been relaxed to such an extent that alien enemies residing in England may maintain an action;

(3) That a resident alien enemy is free to use the Courts, except in so far as such use would accomplish a purpose which might hamper our own war efforts or give aid to the enemy.

(4) That the Trading With the Enemy Act was never intended, without presidential proclamation, to effect resident aliens."

The executive orders of President Roosevelt, the constitutionality of which is assailed, are not limited to alien enemies, or persons whose ancestors were citizens of any nation with which we are now at war. The drastic powers conferred upon the military commander *may be exercised against any person* within the military area without regard to race, color, ancestry or citizenship. No such despotic and tyrannical

power has ever been exercised nor has its exercise ever been attempted in this country.

To find a parallel in modern times we are bound to look in the concentration camps of Germany and Russia, into which are herded all those who are *persona non grata* to Hitler or Stalin.

For years the American press and screen politicians and statesmen, have condemned these practices by foreign dictators. If we permit the President of the United States and his subordinate officers to remove loyal American citizens from their residences, compelling them to give up their business and surrender (as in the case of this petitioner) their means of livelihood, and imprison them without trial, we are but following the example of the Madman of Berchtesgaden while heaping abuse upon him for setting the example.

THE PRESIDENTIAL PROCLAMATIONS AND THE EXCLUSION ORDERS OF GENERAL DE WITT AMOUNT TO A QUALIFIED AND LIMITED DECLARATION OF MARTIAL LAW WHICH CAN NEVER LAWFULLY EXIST, SAVE IN ENEMY TERRITORY, OR IN A ZONE OF ACTUAL MILITARY OPERATIONS, WHERE THE CIVIL COURTS CANNOT FUNCTION.

Following the doctrine of the *Milligan* case, it has been held by the Federal Courts that martial law and the civil law cannot exist together because the former is wholly repugnant to the latter. It has been well said that martial law is in the strict sense not law at all, but rather a cessation of all municipal law as

an incident of the *jus belli* and because of paramount necessity.

Constantin v. Smith, 57 Fed. (2d) 227.

In *Wheat. on International Law* (3rd Ed.) page 740, quoting *In re Ezeta*, 62 Fed. 972, it is said:

> "It is the will of the commander of the force. In the proper sense it is not law at all."

The Duke of Wellington in one of his dispatches from Portugal in 1810, in speaking of martial law, stated that as applied to persons other than officers and soldiers in the Army, it is neither more nor less than the will of the general of the Army, and that he punishes either with or without trial, for crimes either declared to be so, are not so declared by any existing law, or by his own orders. The Duke, who was then fighting on foreign soil, and who was occupying enemy territory, added:

> "I could have established any law that I saw fit, and I established the law of my country."

Subsequently, in a speech in the House of Lords, he stated:

> "In fact, *martial law means no law at all*. Therefore the general who declares martial law and commands that it shall be carried into execution is bound to lay down distinctly the rules and regulations according to which his will is to be carried out."

Hansard's Parliamentary Debates, Vol. XCV, p. 80.

In the case of *In re Egan*, supra, it is stated:

"All respectable writers and publicists agree in the definition of martial law—that it is neither more nor less than the will of the general who commands the army. It overrides and suppresses all existing civil laws, civil officers and civil authorities, by the arbitrary exercise of military power; and every citizen or subject, in other words, the entire population of the country, within the confines of its power, is subject to the mere will or caprice of the commander. **He holds the lives, liberty and property of all in the palm of his hand.** Martial law is regulated by no known or established system or code of laws, as it is over and above all of them. **The commander is the legislator, judge and executioner.** His order to the provost-marshal is the beginning and the end of the trial and condemnation of the accused. There may be a hearing, or not, at his will. If permitted, it may before a drum-head court martial, or the more formal board of a military commission, or both forms may be dispensed with, and the trial and condemnation be equally legal, though not equally humane and judicious."

In *Constantin v. Smith*, supra, the following language is used:

"As I read the authorities there is no occasion for martial law unless the Courts themselves have been so incapacitated by reason of the circumstances existing and calling forth a declaration of martial law that they are unable to function. The reason for martial law is the necessity to rehabilitate the Courts, not to destroy them or usurp their powers."

In *Ex parte Zimmerman,* 132 Fed. (2d) 442, in which the majority of the Court upheld the detention of the petitioner by the military authorities in Hawaii on the grounds that the islands had actually been invaded and bombarded, and that conditions were such as to warrant martial law, Judge Haney, in a dissenting opinion, reviews the history of martial law, showing that it was never countenanced or tolerated in England, and that the framers of the Constitution, fearful of the powers granted to the Federal Government, carefully provided that the privilege of the Writ of *Habeas Corpus* should not be suspended unless, when in cases of rebellion or invasion, the public safety may require it. The learned Judge sums up the entire law on the subject in two sentences,

> *"If the situation is such that the civil government cannot function, the Army rules until such government can be restored. Once the situation returns to normalcy to the extent that civil government can function, military rule or government vanishes and ceases to exist."*

APPELLEES' FEAR THAT RELEASE OF A LOYAL CITIZEN OF THE UNITED STATES MAY INCUR THE DISPLEASURE OF OTHER CITIZENS OR RESIDENTS DOES NOT AUTHORIZE THE IMPRISONMENT, NOW OF ABOUT TWO YEARS DURATION.

It is admitted by appellees that the War Relocation Authority has thoroughly investigated the petitioner and has **"determined that in so far as her personal characteristics and loyalty are concerned, her release**

would not be detrimental to the war program and to the public peace and security". (See Appellees' Brief, Circuit Court, p. 31.) Throughout these proceedings, from their inception, the loyalty and citizenship of appellant has been conceded. As a matter of fact, there is not a single allegation in the petition for a writ of habeas corpus that is challenged. No order to show cause was issued. It is, therefore, a case where the Government concedes

(1) That petitioner is a native-born citizen of the United States;

(2) That she is confined, imprisoned, and restrained of her liberty by appellees by order of General De Witt, the military commander of the district at the time of her incarceration, and by virtue of no other process or authority and for no other reason, except that she is a person of Japanese ancestry;

(3) That she is charged with no crime;

(4) That martial law has not been declared in the district wherein petitioner resides;

(5) That petitioner is not a member of the military forces of the United States;

(6) That all Courts, State and Federal were open and sitting and were hearing and determining all causes, civil and criminal;

(7) That petitioner has a brother serving in the armed forces of the United States.

THE CIRCUIT COURT OF APPEALS HAS POWER TO AND SHOULD ISSUE A WRIT OF HABEAS CORPUS IN THE CASE AT BAR.

The issue before the Court is well stated by appellees to be **"whether it is valid to confine persons who are not suspected of crime or of any culpable conduct or characteristics or of any proclivity or intention to harm the United States, on the ground that their release might for other reasons occasion situations which would adversely affect the prosecution of the war".** (Appellees' Brief, Circuit Court, p. 32.)

Although appellees used the plural "reasons", only one reason is advanced, and that comes under the title "Community Hostility to Unsupervised Relocation". Everything else is an interpretation of possibilities arising from possible community hostility.

By this they mean that communities may be suspicious or hostile toward citizens of Japanese ancestry, as a result of which violence or disorder may occur, and that as a result of violence or disorder the successful prosecution of the war may be affected, because such violence or disorder may necessitate the use of troops to deal with it and because that may affect the fighting morale, and may if carried to an extreme degree interfere with war production, and may aid Japanese propaganda—on the theory that the present war is a racial one—and may bring about reprisals on United States citizens held in Japanese occupied territory.

(I suppose it will occur to the Court that if our recent publicity concerning Japanese savagery in the

treatment of American nationals is to be believed, the Japanese seek no excuse for such acts under the guise of reprisals.)

The United States Supreme Court has heretofore dealt with the question of the abrogation of civil rights under the guise of necessity to prevent civil disorder. One noteworthy case is *Hague v. C. I. O.*, 307 U. S. 496, where the Court held that threatened disorder must be met by police protection instead of the, alleged, more efficient method of refusals and permits which interfered so seriously with the right of assembly.

The second outstanding case on this point is *Buchanan v. Warley*, 245 U. S. 60, 38 S. Ct. 16, where a Negro sought to enforce a contract for the purchase of real property and was denied specific performance because an Illinois statute prohibited any Negro from residing in any block inhabited chiefly by members of the white race.

The justification advanced for the constitutionality of this statute was the identical "community hostility" theory, coupled with the necessity for stifling racial strife and promoting public peace, advanced by the appellees as their justification for the constitutionality of detention of a girl the appellees admit is "not suspected of crime or of any culpable conduct or characteristics or of any proclivity or intention to harm the United States".

The Supreme Court reversed the lower Court in the *Buchanan* case, and said:

"It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution."

The appellees also explore the possibility that Miss Endo may be in a sort of "protective custody". Experience in Europe shows that this custody is usually fatal. The nearest case by analogy is *Stoutenburgh v. Frazier*, 16 App. Dec. D. C. 229, where the Court considered an act of Congress permitting the confinement of a person as a subject of *suspicion* which could have been construed to authorize "preventive custody" *only after a hearing and conviction of being a suspicious person.* The Court held the act unconstitutional.

"Protective custody" of one who asks or seeks it, is not justification for holding one who does not want it. For instance, one confined as a drunkard, where the restraint originally was voluntary and then became involuntary finds an appropriate remedy in habeas corpus. See

Matter of Baker, 29 How. Pr. 485 (N. Y.).

THERE IS NO SPECIFIC AUTHORIZATION BY EITHER THE PRESIDENT OR CONGRESS FOR DETENTION OR IMPRISONMENT OF AN ADMITTEDLY LOYAL AMERICAN CITIZEN.

It is significant that appellees admit that nowhere is there a specific authorization to the commanding gen-

eral to detain Miss Endo or any other American citizen.

Congress has never specifically authorized it, no presidential order has specifically authorized detention, and there is not even an indication that when loyalty has been determined in a citizen, imprisonment should be her lot.

None of the acts taken by anyone prior to March 21, 1942, when Public Law No. 503 was adopted by Congress had intimated that detention of any loyal citizen was to take place.

Congress refused to pass an express authorization for taking all Japanese into custody. (88 Congressional Record, February 19, 1942, S. Rep. No. 1496.)

In the Fall of 1941, Attorney General Biddle spoke of the detention of aliens without trial and said:

> "The Hobbes Bill introduced this year authorizes when and only as long as deportation is impossible detention of the alien in Federal institutions * * * This Bill is in a sense revolutionary because it permits detention without trial by jury. But when aliens cannot be deported some control is desirable. It is a very serious curb on civil rights made essential by the circumstances of war."

See 2 Bill of Rights Review 13.

Prior to that time, and necessitating this statute, our Courts had repeatedly held that the detention of an alien pending deportation for an unreasonable time, even because the country to which he was ordered

deported refused to accept him, could not be justified, and he must be liberated.

See

Bonder v. Johnson, 3 Fed. Rep. (2d) 238, and cases therein cited.

See, also: *Saksagansky v. Weedin*, 53 Fed. (2d) 13.

Thus the only Act of Congress authorizing internment relates solely to aliens. (40 Stat. 531 (1918), 50 U. S. C. Sec. 21 (1941).)

This is also pertinent when read in the light of the Supreme Court's decision, that statutory authorization to the President to seize aliens did not authorize a presidential order seizing alien property. (*Brown v. U. S.*, 8 Cranch 110.)

In the last World War, a statute was proposed in Congress which would have divided this country into military districts, subject to regulation by military commanders. President Wilson wrote thereof to Senator Overman:

> "I am wholly and unalterably opposed to such legislation * * * I think it is not only unconstitutional but that in character, it would put us nearly upon the level of the very people we are fighting * * * It would be altogether inconsistent with the spirit and practice of America * * * I think it is unnecessary and uncalled for."
>
> Volume 8, Baker, Woodrow Wilson Life and Letters, p. 100.

That which Wilson thought unconstitutional and unAmerican has now been done. It calls to mind the

words of former Chief Justice Hughes uttered in 1920, which a denial of a writ of habeas corpus to appellant would make prophetic. The former Chief Justice was speaking of the judicial assault upon the Bill of Rights arising out of the last war's hysteria. He said:

> "We may well wonder in view of the precedence now established whether constitutional Government as heretofore maintained in this Republic could survive another great war, even victoriously waged."

See also

War & Law by Roscoe Pound, 14 Pa. Bar Assn. Quarterly #2-3, Jan.-Apr. 1943.

As far as Wilson's suggestion that such procedure would put us nearly upon the level of the very people we are fighting, Justice Murphy in his concurring opinion in *Hirabayashi v. U. S.*, 63 S. Ct. Rep. 1377, at 1390, 320 U. S. 81, said:

> "Under the curfew order here challenged no less than 70,000 American citizens have been placed under a special ban and deprived of their liberty, because of their particular racial inheritance. *In this sense it bears a melancholy resemblance to the treatment accorded the members of the Jewish race in Germany and other parts of Europe.*"

The entire basis for curfew orders and evacuation and the present detention is found in Executive Order 9066, authorizing the Secretary of War to prescribe military areas, and Executive Order 9102 establishing the War Relocation Authority with the questionable

ratification of them by the Appropriation Acts of Congress or Public Law No. 503 or both.

Nowhere in any of these presidential orders or the Acts of Congress is there a specific, plainly worded authorization for detention of citizens, outside of the military areas.

A. THE PRESIDENTIAL ORDERS UNDER WHICH GENERAL DE WITT'S PROCLAMATIONS WERE ISSUED AND THE PROCLAMATIONS WERE PROFESSEDLY MEASURES TAKEN FOR PROTECTION WITHIN MILITARY AREA NO. 1 AGAINST "ESPIONAGE AND SABOTAGE" AND "IN THE INTERESTS OF NATIONAL SECURITY".

Executive Order 9066 is based upon the necessity for "protection against espionage and against sabotage".

Executive Order 9102 is to "provide for removal from designated areas of persons whose removal is necessary in the interest of National Security". This latter order specifically is directed to persons removed under authority of the prior order 9066.

Public Law 503 provides that whoever shall enter, remain in, leave, or commit any act in any military area, contrary to restrictions applicable to the area of the Secretary of War or the military commander, is guilty of a misdemeanor, provided he had knowledge of the restriction and intent to violate it.

It is equally significant that in the House and Senate discussion preliminary to the passage of Public Law 503, the emphasis at all times was on the necessity for removal of *certain individuals* from limited areas.

Representative Costello for the House Military Affairs Committee said the purpose of the Bill was "to remove certain aliens as well as others from areas in which war production is located and military activities are being conducted".

Senator Reynolds, Chairman of the Senate Military Affairs Committee, said,

> "We are asked to provide the Department with authority to keep *certain individuals* from entering or leaving military zones * * *"

See

88 Congressional Record, Part 2, pages 27,722-25; House of Representatives Reports No. 1906, and 77th Congressional (Second Session) 1942, 2 to 3;

Appellees concede,

> **"It is not entirely clear either that the authority has been granted by the Congress or the President to detain such persons as the appellant or that such detention is constitutional."** (Appellees' Brief, Circuit Court, p. 32.)

It is clear that the basis of her detention is Executive Order No. 9066 and Executive Order No. 9102.

Reliance is placed upon the congressional acts cited by appellees only as ratification by Congress of those two orders.

The question therefore arises, how does Executive Order 9066 specifically based upon the necessity for "protection against espionage and against sabotage" and Executive Order 9102 which is "to provide for

removal from designated areas of persons whose removal is necessary in the interest of national defense" constitute authority for the detention of a citizen of the United States, who according to the appellees has no "proclivity or intention to harm the United States"? (See Appellees' Brief, Circuit Court, p. 32 for quotation.)

What has a loyal citizen to do with espionage or sabotage—how does her imprisonment aid national defense? Unless some reasonable, present and substantial connection is shown, her imprisonment is under orders which are not pertinent to her. It should be borne in mind that not even an order to show cause was issued and the allegations of her petition for the writ of habeas corpus stand unchallenged. To establish any pertinency of these statutes or orders to appellant resort must be had to judicial knowledge. Is this Court prepared to say that at the present time the release of appellant would facilitate espionage or sabotage or that her imprisonment is necessary in the interest of national defense? Or should the Government which holds her on the admitted charge of Japanese ancestry be put to proof to show the connection between the appellant and espionage, sabotage, and national defense?

In this connection also, it should be borne in mind that appellees concede that Public Proclamation No. 8 of General De Witt under which the appellant was removed to the War Relocation Center as a matter of military necessity was founded on the findings of Proclamation Nos. 1 and 2 of General De Witt, and

"was relying on the objective of protection against espionage and sabotage in connection with any attempted invasion as the justification for the detention regulation". (See Appellees' Brief, Circuit Court, p. 52.)

This also should be given consideration with respect to the fact that any justification for restriction of personal rights based upon an emergency should cease when the emergency ceases. (*In re Egan*, 8 Fed. Cas. 367.) Consequently; it would seem that not alone has the Government conceded appellant's detention has no connection with the suppression of espionage or sabotage, but also it now devolves upon the Government to show the danger of invasion and how her detention is connected with the emergency arising from a *present* danger of invasion. This they cannot do.

Of course, we ask this Court to keep in mind that at no time do we concede that the President of the United States has authority which he can exercise *in personam*, or by delegation to a military commander, to detain loyal American citizens, even in time of war for a period longer than is necessary to determine their loyalty.

With respect to this, it should be borne in mind by this Court that not alone were American citizens of Japanese ancestry discriminated against, compared with the treatment of fellow citizens of non-Japanese ancestry, *but these American citizens of Japanese ancestry were relegated to a position inferior even to that of enemy aliens.*

It is a matter of common knowledge that following the outbreak of war restrictions were placed upon the movement of enemy aliens (German and Italian natives), and at the same time those aliens suspected by Army Intelligence, Navy Intelligence, the Federal Bureau of Investigation, and others, were detained. These aliens however were given a semblance of due process, even those suspected as dangerous to this country, in that boards reviewed their cases, and except for a negligible minority released them.

Today, on the waterfront of the Pacific Coast and also in the war production plants, persons who are technically enemy aliens, but whose loyalty to the United States is now admitted, are walking free of restraint.

The relation of this state of facts to equal protection and due process will be later treated.

It may well be essential to supervise persons whose removal is necessary in the interest of national security, directed to the suppression of espionage and sabotage, but assuming for the moment the validity of the temporary exclusion of appellant, pending the determination of her loyalty, or even a step further, her exclusion regardless of her loyalty, such an assumption is no authority for detention after her removal and the establishment of her loyalty. She has lost home, business, her way of life; it is time for the Court to stay the hand of oppression.

To hold that the appellant can be so detained necessitates the overruling of *Ex parte Fields*, 5 Blach., 63 Fed. Cas. 4761; *Ex parte Merryman*, 17 Fed. Cas., p. 144, and *In re Milligan*, 70 U. S. 1, 18 Law. Ed. 281.

B. POWER TO IMPRISON WITHOUT CHARGE, TRIAL OR ANY OTHER PROCESS SHOULD BE BASED ON MORE THAN IMPLICATION FROM PRESIDENTIAL ORDERS AND CONGRESSIONAL STATUTES, THE CONTITUTIONALITY OF WHICH ORDERS OR STATUTES THEMSELVES MUST BE DEFENDED BY FAR FETCHED IMPLICATION FROM DEFINITE POWERS GIVEN BY THE CONSTITUTION.

The appellees in this case are finally driven to the expedient of saying "The executive order by *implication* authorizes regulations providing for such detention". (Appellees' Brief, Circuit Court, p. 46.)

It is a novel theory that detention of a loyal American citizen should be considered an *implied* part of the authority of the War Relocation Authority under an executive order "which does not expressly grant this important authority to detain citizens not accused of crime or disloyalty". (See Note 49, p. 47, Appellees' Brief, Circuit Court.)

Appellees cite numerous cases to the effect that the existence of war gives rise to a special standard for appraising the constitutionality of the delegation of congressional war powers. (See Appellees' Brief, Circuit Court, p. 57.)

None of these cases involves the imprisonment of a citizen of the United States who has no "proclivity or intention to leave the United States".

In *U. S. v. Carolyn Products*, 304 U. S. 44, the query was stated whether "There may be a narrower scope for the operation for the presumption of constitutionality when legislation appears on its face * * * to be within the first Ten Amendments".

In *Schneider v. Irvington*, 308 U. S. 147, at 161, Justice Roberts answered that question.

> "In every case, therefore, when legislative abridgement or rights is asserted, the Courts should be astute to examine the facts of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of Democratic institutions. *Individual rights are specifically provided for by the Constitution as are governmental powers*, and it should be remembered that the Government was in effect created for the protection of those rights. When these so-called unalienable rights are involved, the limitation on Government power is not as important as is the limitation of the individual's rights."

Considerable reliance is placed by appellees upon the recent case of the Supreme Court, *Hirabayashi v. U. S.*, 320 U. S. 81. That conviction took place on May 9, 1942.

Chief Justice Stone's opinion points out the restrictive application of that decision when he said:

> "We decide only the issue as we have defined it—we decide only that the curfew order as applied and *at the time* it was applied was within the boundaries of the war power." (p. 102.)

One of the justifications for sustaining the validity of Public Law 503, in so far as it applied to curfew orders was the fact that curfew orders were in effect

when the law was passed, and so within the contemplation of the law-making body.

(See p. 91 of decision.)

Appellees admit, however, that with respect to detention "legislative history does not indicate that detention was contemplated or that Congress was advised that it was anticipated, at the time of the enactment of the statute". (Appellees' Brief, Circuit Court, p. 55.).

Since detention was not within the contemplation of Congress when it passed Public Law 503 it is difficult to determine how that law is authority for the detention.

A further defect arises, as to the constitutionality of Public Law 503 as far as detention is concerned, or at all, in the light of the decisions of the Supreme Court in *U. S. v. Cohen Grocery*, 225 U. S. 81, 41 S. Ct. 298, of *Schechter v. U. S.*, 295 U. S. 495.

In the *Schechter* case this Court said:

> "Extraordinary conditions do not create or enlarge constitutional power. The Constitution established a national government with powers deemed to be adequate as they proved to be both in war and in peace, but these powers of the National Government are limited by the Constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary."

While the *Schechter* case referred to times of war, it in fact dealt with an emergency not arising from

war. In the *Cohen Grocery* case, supra, this language appeared:

> "We are of the opinion that the court below was clearly right in ruling that the decisions of this court indisputably establish that the mere existence of a state of war could not suspend or change the operation upon the power of Congress of the guarantees and limitations of the Fifth and Sixth Amendments as to questions such as we are here passing upon. (Citing cases including *Ex parte Milligan.*) It follows that in testing the operation of the Constitution upon the subject here involved, the question of the existence or non-existence of a state of war becomes negligible and we put it out of view." (p. 306.)

This language is particularly pertinent in view of the fact that the appellant is relying upon plain language occurring in the Bill of Rights, guaranteeing her against, among other things, the type of restraint which she is now suffering with the incidental degradation which is hers, while by contrast, those holding her under restraint state as their authority for such detention, that it is theirs by *implication* and "the detention is merely a necessary incident to this vital social planning". (See Appellant's Brief, Circuit Court, p. 46.)

In the case of *Constantin v. Smith,* the decision in the lower Court appears in 57 Fed. (2d) 227. The language used has particular relevance in view of the fact that the appellees claim the right to imprison or detain under armed guard a citizen and found that right *in an implication.* In the *Constantin* case, the Court said:

"Looking first to defendant's contention, we think it might reasonably be expected that, in the support of pretention so vast, of authority so absolute, and uncontrolled as here asserted, of power in the executive of a state by fiat to suspend not only the Constitution of the State, but of the United States, to the extent of depriving their courts of jurisdiction to inquire into and redress grievances, defendants would point to enabling constitutional provisions, state or national, or at least clear and convincing authority supporting their claim."

"We have examined the constitutional provision which they rely on. We have examined every authority cited by them. We have found none, we conclude that none exist which as against the claim of deprivation of property supports defendant's claim to immunity from judicial inquiry, and none which has even considered, much less declared, that a court of the United States may not, by injunction, prevent the deprivation of property, such as is here occurring." (p. 235.)

In the case at bar, the Government as distinguished from claiming an absolute control over property, now claims that they have an absolute unrestrained and unreviewable claim over the liberty of citizens.

The Court also said:

"We reject then as entirely without substance, contrary to the genus of the two governments, Federal and State, and opposed to the very conception upon which this government was founded and has been maintained, the contention that any officers of a state, whether Executive, Legislative or Judicial, can, by proclamation or otherwise,

> erect himself above the jurisdiction of the Federal courts, withdraw his actions affecting private property from judicial inquiry, and insulate himself from judicial process and consequences of disobedience to the judicial decree." (p. 236.)

(Of course, it has heretofore been held that the police power, like other powers, is subordinate to the Constitution (*Stockwell v. State*, 221 S. W. 932).)

See, also,
Stoutenburgh v. Frazier, supra.

Appellees would have this Court believe that such arbitrary power, achieved by implication, is theirs because they cloak it under the designation "War Powers".

For a classic dissertation upon the nature and extent of "War Powers" we refer this Court to the case of *Griffin v. Wilcox*, 21 Ind. 370.

THE EXERCISE OF DISCRETIONARY POWER BY THE EXECUTIVE, EVEN IN AN EMERGENCY, IS SUBJECT TO JUDICIAL REVIEW AS TO THE FACTUAL EXISTENCE OF THE EMERGENCY AND THE NECESSITY FOR AND THE REASONABLENESS OF THE PARTICULAR ACT.

Reliance also is placed upon the theory that in the exercise of war power, the Executive and Congress have wide scope for the exercise of judgment and discretion in determining the nature or extent of threatened injury and selecting the means for resisting it.

Language to that effect appearing in the *Hirabayashi* case, supra, is quoted at page 59 of appellees' brief.

While some discretion does rest with the Executive and with Congress, as it was there pointed out, the Supreme Court in a series of cases has held that the exercise of such discretion is subject to review by the Courts. See

Sterling v. Constantin, 287 U. S. 378, at p. 400.

The Court said that the fact that the Executive has a range of discretion incidental to his power to suppress disorder does not mean, that no matter how unjustified the action of the Government may be, that it is conclusively supported by mere executive fiat and then said:

> "The assertion, that such action can be taken as conclusive proof of its own necessity and must be accepted as in its due process of law, has no support in the decisions of this court." (See pp. 400-402.)

The *Hirabayashi* case reaffirms this.

"THE ADMINISTRATIVE PROCESS, WHICH IT IS CLAIMED APPELLANT HAS FAILED TO EXHAUST, DOES NOT AMOUNT TO DUE PROCESS AND MAKES NO REAL PROVISION FOR RELIEF BY GIVING A FINAL DISCHARGE FROM IMPRISONMENT UPON DETERMINATION OF LOYALTY OF THE CITIZEN DETAINED OR IMPRISONED.

In the decisions "due process of law" is repeatedly referred to. It should be borne in mind that appellant in this case has never been charged with any offense, has had no opportunity to defend herself against any charge, has never been tried for any offense with or without a jury, has never had an opportunity to secure witnesses on her own behalf; she has had no process

of any kind. Despite this, appellees would have the Court believe she is barred from relief on the ground that there is administrative remedy.

She has been incarcerated now for a period of two years. She has been moved willy nilly from place to place, from State to State. She is under armed guard. She has suffered all the degradation of the convicted felon, despite the fact that she is admitted to be a loyal citizen, and despite the fact that it has been "determined that in so far as her personal characteristics and loyalty are concerned, her release would not be detrimental to the war program and to the public peace and security". (Appellees' Brief, Circuit Court, p. 31.)

The inadequacy of the administrative relief offered appellant is shown by the fact that Miss Endo is informed "that she is not at the time eligible for employment in plants and facilities vital to the war effort". (See Appendix, p. 13.)

War Relocation Authority Form No. 131 (see Appendix F) informs Miss Endo that she is eligible "to be entered on the list of those cleared for indefinite leave" and specifically provides that leave is for "the purpose of employment or residence in the Eastern Defense Command as well as other areas", and refers to Administrative Instruction No. 22. (See page 28 of Appendix, Part 2 of which reads as follows):

> "The applicant for a permit must show that he has a specific job opportunity with a prospective employer at a designated place outside the relocation center and outside the Western Defense Command."

Section 9 of Administrative Instruction No. 22 reads as follows:

> "Every applicant issued a permit pursuant to this instruction * * * will remain in the constructive custody of the military commander * * * Any such permit may be revoked at any time * * * and the applicant * * * be required to return to the relocation center or such other place as the director specifies if the director shall find such revocation to be necessary in the public interest."

The most that can be said of the administrative process now in effect is that Mitsuye Endo may apply for a parole from a concentration camp provided she is able to establish that she has

(1) A specific job opportunity, or independent means, and

(2) That the community where she has the job opportunity is willing to accept her, and

(3) A willingness to make such reports as the authority desires.

Appellants in their brief in the Circuit Court have so conceded. (See p. 10 thereof.)

Laws of similar import directed against so-called "vagrants" have been held unconstitutional. Such a decision arose in the Ninth Circuit years ago as a result of such attempted statutory restriction in Hawaii. (See *Hawaii v. Anduha*, 48 Fed. (2d) 171 (1931).)

In that case, the Court said:

> "The Constitution and the laws are framed for the public good and the protection of all citizens

> from the highest to the lowest and no one may be restrained of his liberty unless he has transgressed some law. Any law which would place the keeping and safe conduct of another in the hands of even a conservator of the peace, unless for some breach of the peace committed in his presence, or upon suspicion of felony would be most oppressive and unjust and destroy all the rights which our Constitution guarantees." (p. 172.)

The effect of this decision is to establish the right to habitually "loaf"; "loiter" or "idle".

The Court further said:

> "In any view we take of it the act trenches upon the inalienable rights of the citizen to do what he will and when he will, so long as his course of conduct is not inimicable to himself or to the general public of which he is a part." (p. 173.)

In regard to the obligation attempted to be imposed upon petitioner to make "reports", we refer the Court again to *Bonder v. Johnson*, 5 Fed. Rep. (2d) 238.

In that case, the petitioner for writ of habeas corpus was arrested by an agent of the Department of Justice on the charge that he was engaged in a Red or Communistic plot to overthrow our form of Government.

A valid order of deportation was outstanding against him under which he was being detained at the time he sought the writ of habeas corpus. The Court held he could not be imprisoned indefinitely pending recognition of the Soviet Government by the United States because of inability to deport him to Russia. Since

the right to arrest and hold and imprison an alien is merely an incident of the right to exclude and deport and that no Court or tribunal has power to hold indefinitely any sane citizen or alien in prison, except as punishment for crime.

The Court further held that the alien could not be required to furnish bond and report at intervals to the Immigration Commissioner until he could be deported to Russia. (See p. 239.)

There also it was conceded that petitioner was not being held as punishment for crime.

The invalidity of requiring a showing of independent means, a specific job opportunity, and community acceptance would appear to have been determined adversely to the appellees in *Edwards v. California*, 62 S. Ct. 164, 314 U. S. 460.

APPELLANT IS OFFERED RELIEF SIMILAR TO PAROLE OR PROBATION OFFERED A CONVICTED FELON EXCEPT THAT THE RELIEF OFFERED APPELLANT IS NOT AS COMPLETE AS THAT AVAILABLE TO THE FELON.

The utmost relief available to appellant is a modified form of the parole available to the felon who has properly comported himself in a penitentiary.

Yet the lowest felon who is granted parole—or the probationer—has achieved a status superior to that which appellant may anticipate. The paroled felon, or probationer, knows that *his* acts alone shall determine his fate; his own good behavior is guarantee against a resumption of imprisonment. Even while

on parole or probation the felon knows imprisonment can reoccur only after charges and a hearing.

The parolee or probationer also knows the duration of the period during which the government has the *right*, a penalty for the original wrongdoing, to supervise his activities, limit his activities, and require him to give the identical reports required of appellant in the case at bar.

The utmost relief available to appellant, while similar to the parole or probation given to the felon, is not as great a privilege. It is designated an "indefinite leave". The very name indicates its inadequacy and lack of finality, as relief offered a loyal citizen now imprisoned.

As before stated the parolee or probationer by his own acts determines his own future. And at end of a set term he is free of his restrictions and achieves liberty similar to that of his fellow citizens. Regardless of the innocuous activities, the blameless or praiseworthy life of appellant, in maintenance of the character of loyal citizen given her in appellees' brief, at the fiat of the Director of the W.R.A. on the ground of public interest, without charge, investigation, trial or appeal, she may be ordered to return to her prison or elsewhere as the Director may see fit.

This may result from acts of irresponsible third parties. In fact under the theory of the government, an attack by rowdies, citizen or alien, upon appellant might well constitute sufficient reason to result in the reimprisonment of the victim of the unprovoked attack—the appellant.

As was pointed out in *Bonder v. Johnson*, supra, even the alien arrested on the charge of conspiracy to overthrow the government and ordered deported is not obliged to continuously, indefinitely make reports of his activities or movements to a governmental agency.

The parolee, the probationer, the imprisoned felon and the appellant have in common only the degradation of being set apart from their fellow Americans.

The drunk, the insane, the prostitute, the enemy alien, all are granted a hearing before being deprived of liberty. If there is no hearing sufficient to meet the requirements of due process of law the ancient writ of habeas corpus opens the doors of prison, hospital or detention barracks and gives deliverance.

"All hope abandon ye who enter here" appears only at the gate of the concentration camp reserved for loyal American citizens like appellant.

THE LEGALITY OF THE RESTRICTIONS UPON THE RIGHTS OF CITIZENS IS ALWAYS DETERMINED IN THE LIGHT OF EXISTING CIRCUMSTANCES. IN CASE OF APPLICATION FOR WRIT OF HABEAS CORPUS THAT MEANS CIRCUMSTANCES EXISTING WHEN THIS COURT PASSES UPON THE QUESTION.

Again the present reasonableness of such restrictions, assuming without admitting their original legality, is the test which must now be applied to them.

In *Schuyler v. Drumm*, District of Pa., 51 Fed. Sup. 383, and in *Ebel v. Drumm*, District of Mass., 52 Fed.

Sup. 189, decided in August and September respectively of 1943, individual exclusion orders issued by the military commander in the Eastern Defense Command, whose authority, the legality of which was based upon Executive Orders No. 9066 and 9102 were held invalid.

The Court said:

> "There was not a present reasonable and substantial basis for the judgment of the military authorities that the threat of espionage and sabotage, which is the basis of executive orders, was real and imminent."

In April, 1944, martial law was ruled invalid in Hawaii. (See *Kahanamoku v. Duncan* and *Stein v. White*, Nos. 10,763-10,764, now pending Ninth Circuit.)

On the Pacific Coast dim-out orders had been lifted, and other restrictions had been done away with. Enemy aliens are now back on the coast. Persons of non-Japanese ancestry heretofore excluded are now at large in San Francisco, so that under any test of present reasonable and substantial threat of espionage or sabotage, the appellees fail.

In August, 1942, two persons of Japanese ancestry who had filed suit in the District Court in Los Angeles to require that they be permitted to reenter California had a motion for dismissal made by the United States Attorney granted because the restrictions were lifted as to them. One was the widow of a Japanese

American who died in defense of the American way of life.

Shiramizu et al. v. Bonesteel et al., Superior Court, State of California, in and for the County of Los Angeles.

At present in California there are soldiers on leave, soldiers convalescent from wounds, and still others in training for combat—all of Japanese ancestry—and some Japanese married to Caucasians.

Of course, we reiterate once again that regardless of the existence of such a threat or emergency, the appellees have conceded that the appellant has no connection or desire to be connected with any such activities against the Government.

Thus, we have a situation where not alone has the emergency, if any abated, but her loyalty has been determined. Nevertheless, true to historical precedent, a grasping executive seeks to maintain extra-constitutional power, originally claimed to be justified by proclamation of an emergency coupled with alleged uncertainty as to the loyalty of this individual, after her loyalty has been established and the emergency, if any, has passed.

That has been the history of executive power preceding the Magna Charta and the Declaration of Independence, which necessitated a written Constitution with an added Bill of Rights to protect the citizen from the Frankenstein creature which too often evolves from the servant the citizens created—called Government.

THE APPLICATION OF EXCLUSION ORDERS SOLELY TO CITIZENS OF JAPANESE ORIGIN, AND THE INCARCERATION OF SUCH CITIZENS ONLY, AND THE RESTRICTIVE SUPERVISION OF THE FREEDOM OF ONE GROUP OF CITIZENS BECAUSE OF RACIAL ORIGIN CONSTITUTES A DENIAL OF DUE PROCESS OF LAW.

While it is true the *Hirabayashi* case at page 100 remarks that sometimes racial discriminations may be relevant, we do not agree they are relevant in these cases. Nor has any showing of relevancy been made.

The very lack of hearing, where the Japanese ancestry group was concerned which was granted even to enemy aliens, constitutes a lack of due process. As was heretofore pointed out, the vast group of Italian aliens and German aliens were cleared of disloyalty by October, 1942, and permitted to return to the West Coast. Hearing boards were established for them. (See Survey of Activities of Department of Justice issued by Attorney General Biddle Dec. 1942.)

The Army was well able to test individual loyalty when it inducted evacuees into the Army and so enabled citizens of Japanese blood to spend that blood on Italian battlefields and elsewhere.

The facts and circumstances which go to establish the reasonableness of a classification essential to constitute due process necessarily assume a relation between the facts and the conclusion drawn therefrom. Race has no bearing on any possible tendency to sabotage or disloyalty. It was the alleged danger of sabotage and espionage which was the basis of the Executive Orders under which these people were evacuated and detained.

In *Edwards v. California,* supra, it was stated:

> "We should say now and in no uncertain terms that a man's mere property status without more cannot be used by a state to test, qualify, or limit, his right as a citizen of the United States * * * The mere state of being without funds is a neutral fact * * * constitutionally an irrelevance, like *race,* creed, or color."

In *Skinner v. Oklahoma,* 316 U. S. 535, the Court said:

> "* * * when the law lays an unequal hand on those who have committed intrinsically the same type of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular *race* or nationality for oppressive treatment."

It is true that the Executive Orders did not mention citizens of Japanese ancestry.

The Executive Orders said: "any person" and Public Law 503 used the term "whoever". The administration, however, was based on race which has no bearing on or connection with a tendency to sabotage, espionage, disloyalty in any of their phases. (See 28 Cor. Law Quarterly, at p. 453.) (There are two excellent articles relating to the treatment of citizens of Japanese ancestry citing numerous cases in this article.)

These actions by the military authorities in their treatment of American citizens of Japanese ancestry as contrasted with the treatment of other citizens, and particularly of enemy aliens, constitutes administra-

tion "by public authority with an evil eye and an unequal hand", so as to deprive the whole procedure of constitutional validity within the decision of *Yick Wo v. Hopkins*, 118 U. S. 356, despite the all inclusive language of the orders and the law.

THE COURT MUST EITHER OVERRULE IN RE MILLIGAN AND SIMILAR CASES OR GRANT APPELLANT HER FREEDOM

We have heretofore referred to the fact that to permit detention of a loyal American citizen without charge under the order of a military commander necessitates the overruling of the cases of *Ex parte Fields, In re Merryman,* and *In re Milligan,* supra.

The appellees seek to circumvent the plain language of the *Milligan* case, by saying that the Executive has not in this case attempted "to perform the functions of the judiciary by conducting a trial of a civilian before a military tribunal".

(See Appellees' Brief, Circuit Court, p. 64.)

We suppose this may be construed as an admission that if this appellant were being detained as the result of a trial of a military tribunal, a writ of habeas corpus would be available to end such detention.

At least, such a trial would constitute an attempt, abortive though it might be, at due process. We fail to see how a stronger case for the constitutionality of detention is established where there is no charge, no trial before the detention, where if there were suspicions, investigation has dissipated them, *than* in a

case where there were suspicions, charges, a trial, witnesses, an attorney, and the other attributes leading to a conviction, even though the tribunal is a military court.

It would seem that if the *Milligan* case is still law and a citizen cannot be imprisoned as a result of conviction by a military tribunal after a trial before the military tribunal, *a fortiori* imprisonment by mere order of a military commander because of an unfortunate choice in ancestry would likewise be illegal.

Even Quirin and his fellow saboteurs were given a trial with the right to an attorney, and all the other rights incidental to a trial, before the authority, found in the Presidential Order which authorized the military commission, was exercised.

Likewise the appellees state we misplace emphasis on principles relating to martial law. The only reason that martial law is applicable to the present situation is the fact that in the *absence of martial law*, the orders of the military commander lose the semblance of legality with which a valid existence of martial law *might* cloak them. (See *Sterling v. Constantin*, supra; *U. S. v. Adams*, 26 Fed. (2d) 141; *Constantin v. Smith*, 287 U. S. 378.)

DETENTION OF JURORS OR MATERIAL WITNESSES FOR SHORT PERIODS OR OF PERSONS INFECTED WITH DISEASE FOR ITS DURATION UNDER STATUTES PROVIDING FOR DUE PROCESS IS NOT AUTHORITY FOR DETENTION OF A LOYAL CITIZEN FOR 23 MONTHS TO PREVENT ESPIONAGE OR SABOTAGE OR IN THE INTEREST OF NATIONAL SECURITY.

In conclusion, we advert to the suggestion by appellees that the present confinement is not for the purpose of punishing criminals or preventing crime, and wherein it is compared to such short detention of jurors or material witnesses, or of persons who are dangerous due to physical or mental disease. (See Appellees' Brief, Circuit Court, p. 65.)

Of course, it has been held that the *temporary* detention of a person who has a dangerous or communicable disease pending its cure or of a person suspected of having it pending determination is valid when there is statutory authority for detention providing due process. But either due process of law provides for a determination of the reasonableness of the detention by connecting the detained person with the *charge*, or a writ of habeas corpus will issue.

See

39 *Corpus Juris Secundum*, Health, pp. 828-829.

At the outset, the appellant was suspected of infection by the virus of disloyalty. She has undergone all tests and passed them but remains in quarantine. The appellees' analogy fails.

THE HIRABAYASHI CASE IS NOT A BAR TO APPELLANT'S RELIEF.

It is submitted that the Supreme Court in the *Hirabayashi* case specifically reserved the question of whether a failure to report to a civil control station preliminary to exclusion was a crime.

The Court there restricted even detention to temporary detention.

The Court there stated that an opportunity could be given to establish loyalty in some appropriate proceeding.

The Court there refused to determine whether the administrative remedy for the establishment of exemption from application of the orders was the only remedy or would have to be first exhausted.

The Court there refused to determine whether the liberties of the applicant could be restored only outside the areas in question. The following language appears:

> "But if it were plain that no machinery were available whereby the individual could demonstrate his loyalty as a citizen in order to be reclassified, questions of a more serious character would be presented." (p. 109.)

Justice Murphy said:

> "In my opinion this goes to the very brink of Constitutional power." (p. 111.)

Again it was pointed out there that the violation of the curfew order arose during a critical military phase and this language was used:

"Whether such a restriction is valid today is another matter." (p. 113.)

Even in June, 1943, the date of the *Hirabayashi* decision, the validity of even a curfew restriction might be "another matter"; what is the status of the detention *now* of a loyal citizen beyond the exclusion area?

The fact that *Korematsu v. U. S.* is to be heard by the Supreme Court even though his offense was committed in May, 1942, again strengthens appellant's prayer for relief.

It is respectfully prayed that this Court forthwith award petitioner and appellant a writ of habeas corpus and proceed in a summary way to determine the facts of the case and to dispose of said appellant as law and justice require under the circumstances as they now exist, by ordering appellant's release.

Dated, San Francisco, California,
September 14, 1944.

Respectfully submitted,
WAYNE M. COLLINS,
Attorney for Appellant.

JAMES C. PURCELL,
WILLIAM E. FERRITER,
Of Counsel.

(Appendices A to H Follow.)

Appendices.

Appendix A

Executive Order 9066 dated February 19, 1942, 7 F. R. 1407.

AUTHORIZING THE SECRETARY OF WAR TO PRESCRIBE MILITARY AREAS.

WHEREAS the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities as defined in Section 4, Act of April 20, 1918, 40 Stat. 533, as amended by the Act of November 30, 1940, 54 Stat. 1220, and the Act of August 21, 1941, 55 Stat. 655 (U. S. C., Title 50, Sec. 104);

NOW, THEREFORE, by virtue of the authority vested in me as President of the United States, and Commander in Chief of the Army and Navy, I hereby authorize and direct the Secretary of War, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion. The Secretary of War is hereby authorized to provide for residents of any such area who are excluded there-

from, such transportation, food, shelter, and other accommodations as may be necessary, in the judgment of the Secretary of War or the said Military Commander, and until other arrangements are made to accomplish the purpose of this order. The designation of military areas in any region or locality shall supersede designations of prohibited and restricted areas by the Attorney General under the Proclamations of December 7 and 8, 1941, and shall supersede the responsibility and authority of the Attorney General under the said Proclamations in respect of such prohibited and restricted areas.

I hereby further authorize and direct the Secretary of War and the said Military Commanders to take such other steps as he or the appropriate Military Commander may deem advisable to enforce compliance with the restrictions applicable to each Military area hereinabove authorized to be designated, including the use of Federal troops and other Federal Agencies, with authority to accept assistance of state and local agencies.

I hereby further authorize and direct all Executive Departments, independent establishments and other Federal Agencies, to assist the Secretary of War or the said Military Commanders in carrying out this Executive Order, including the furnishing of medical aid, hospitalization, food, clothing, transportation, use of land, shelter, and other supplies, equipment, utilities, facilities, and services.

This order shall not be construed as modifying or limiting in any way the authority heretofore granted

under Executive Order No. 8972, dated December 12, 1941, nor shall it be construed as limiting or modifying the duty and responsibility of the Federal Bureau of Investigation, with respect to the investigation of alleged acts of sabotage or the duty and responsibility of the Attorney General and the Department of Justice under the Proclamations of December 7 and 8, 1941, prescribing regulations for the conduct and control of alien enemies, except as such duty and responsibility is superseded by the designation of military areas hereunder.

THE WHITE HOUSE,
February 19, 1942.

Appendix B

EXECUTIVE ORDERS.

EXECUTIVE ORDER NO. 9102, dated March 18, 1942, 7 F. R. 2165.

ESTABLISHING THE WAR RELOCATION AUTHORITY IN THE EXECUTIVE OFFICE OF THE PRESIDENT AND DEFINING ITS FUNCTIONS AND DUTIES.

By virtue of the authority vested in me by the Constitution and statutes of the United States, as President of the United States and Commander in Chief of the Army and Navy, and in order to provide for the removal from designated areas of persons whose removal is necessary in the interests of national security, it is ordered as follows:

1. There is established in the Office for Emergency Management of the Executive Office of the President the War Relocation Authority, at the head of which shall be a Director appointed by and responsible to the President.

2. The Director of the War Relocation Authority is authorized and directed to formulate and effectuate a program for the removal, from the areas designated from time to time by the Secretary of War or appropriate military commander under the authority of Executive Order, No. 9066 of February 19, 1942, of the persons or classes of persons designated under such Executive Order, and for their relocation, maintenance, and supervision.

3. In effectuating such program the Director shall have authority to (a) Accomplish all necessary evacuation not undertaken by the Secretary of War or appropriate military commander, provide for the relocation of such persons in appropriate places, provide for their needs in such manner as may be appropriate, and supervise their activities.

(b) Provide, insofar as feasible and desirable, for the employment of such persons at useful work in industry, commerce, agriculture, or public projects, prescribe the terms and conditions of such public employment, and safeguard the public interest in the private employment of such persons.

(c) Secure the cooperation, assistance, or services of any governmental agency.

(d) Prescribe regulations necessary or desirable to promote effective execution of such program, and, as a means of coordinating evacuation and relocation activities, consult with the Secretary of War with respect to regulations issued and measures taken by him.

(e) Make such delegations of authority as he may deem necessary.

(f) Employ necessary personnel, and make such expenditures, including the making of loans and grants and the purchase of real property, as may be necessary, within the limits of such funds as may be made available to the Authority.

4. The Director shall consult with the United States Employment Service and other agencies on

employment and other problems incident to activities under this order.

5. The Director shall cooperate with the Alien Property Custodian appointed pursuant to Executive Order No. 9095 of March 11, 1942, in formulating policies to govern the custody, management, and disposal by the Alien Property Custodian of property belonging to foreign nationals removed under this order or under Executive Order No. 9066 of February 19, 1942; and may assist all other persons removed under either of such Executive Orders in the management and disposal of their property.

6. Departments and agencies of the United States are directed to cooperate with and assist the Director in his activities hereunder. The Departments of War and Justice, under the direction of the Secretary of War and the Attorney General respectively, shall insofar as consistent with the national interest provide such protective, police and investigational services as the Director shall find necessary in connection with activities under this order.

7. There is established within the War Relocation Authority the War Relocation Work Corps. The Director shall provide, by general regulations, for the enlistment in such Corps, for the duration of the present war, of persons removed under this order or under Executive Order No. 9066 of February 19, 1942, and shall prescribe the terms and conditions of the work to be performed by such Corps, and the compensation to be paid.

8. There is established within the War Relocation Authority a Liaison Committee on War Relocation

which shall consist of the Secretary of War, the Secretary of the Treasury, the Attorney General, the Secretary of Agriculture, the Secretary of Labor, the Federal Security Administrator, the Director of Civilian Defense, and the Alien Property Custodian, or their deputies, and such other persons or agencies as the Director may designate. The Liaison Committee shall meet at the call of the Director and shall assist him in his duties.

9. The Director shall keep the President informed with regard to the progress made in carrying out this order, and perform such related duties as the President may from time to time assign to him.

10. In order to avoid duplication of evacuation activities under this order and Executive Order No. 9066 of February 19, 1942, the Director shall not undertake any evacuation activities within military areas designated under said Executive Order No. 9066, without the prior approval of the Secretary of War or the appropriate military commander.

11. This order does not limit the authority granted in Executive Order No. 8972 of December 12, 1941; Executive Order No. 9066 of February 19, 1942; Executive Order No. 9095 of March 11, 1942; Executive Proclamation No. 2525 of December 7, 1941; Executive Proclamation No. 2526 of December 8, 1941; Executive Proclamation No. 2527 of December 8, 1941; Executive Proclamation No. 2533 of December 29, 1941; or Executive Proclamation No. 2537 of January 14, 1942; nor does it limit the functions of the Federal Bureau of Investigation.

Appendix C

STATUTES.

Act of March 21, 1942 (Public Law 503, 77th Cong., 2d Sess., c. 191, 56 Stat. 173, U. S. C., Tit. 18, Sec. 97a).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed $5,000 or to imprisonment for not more than one year, or both, for each offense.

Approved, March 21, 1942.

Appendix D

PROCLAMATIONS

PUBLIC PROCLAMATION No. 8 OF GENERAL J. L. DEWITT (7 F. R. 8346).

June 27, 1942

"To: The people within the States of Washington, Oregon, California, Montana, Idaho, Nevada, Utah and Arizona, and the Public Generally:

"Whereas by Public Proclamation No. 1,[1] dated March 2, 1942, this headquarters, there were designated and established Military Areas Nos. 1 and 2, and by Public Proclamation No. 2,[2] dated March 16, 1942, this headquarters, there were designated and established Military Areas Nos. 3, 4, 5, and 6, and

"Whereas the present situation within these military areas requires as a matter of military necessity that persons of Japanese ancestry who have been evacuated from certain regions within Military areas Nos. 1 and 2 shall be removed to Relocation Centers for their relocation, maintenance and supervision and that such Relocation Centers be designated as War Relocation Project Areas and that appropriate restrictions with respect to the rights of all such persons of Japanese ancestry, both alien and non-alien, so evacuated to such Relocation Centers and of all other persons to enter, remain in, or leave such areas be promulgated;

---

[1] 7 F. R. 2320.
[2] 7 F. R. 2405.

"Now, Therefore, I, J. L. DeWitt, Lieutenant General, U. S. Army, by virtue of the authority vested in me by the President of the United States and by the Secretary of War and my powers and prerogatives as Commanding General of the Western Defense Command, do hereby declare that:

"§ 10.3.2 *War Relocation Project Areas; Washington, Oregon, California, Montana, Idaho, Nevada, Utah and Arizona.* (a) Pursuant to the determination of military necessity hereinbefore set out, all the territory included within the exterior boundaries of each Relocation Center now or hereafter established within the Western Defense Command, as such boundaries are designated and defined by orders subsequently issued by this headquarters, are hereby designated and established as War Relocation Project Areas.

"(b) All persons of Japanese ancestry, both alien and nonalien, who now or shall hereafter be or reside, pursuant to exclusion orders and instructions from this headquarters, or otherwise, within the bounds of any established War Relocation Project Area are required to remain within the bounds of such War Relocation Project Area at all times unless specifically authorized to leave as set forth in paragraph (c) hereof.

"(c) Any person of Japanese ancestry, both alien and nonalien, who shall now or hereafter so be or reside within any such War Relocation Project Area shall, before leaving said Area, obtain a written authorization executed by or pursuant to the express

authority of this headquarters setting forth the effective period of said authorization and the terms and conditions upon and purposes for which it has been granted.

"(d) No persons other than the persons of Japanese ancestry described in paragraph (b) hereof, and other than persons employed by the War Relocation Authority established by Executive Order No. 9102,[3] dated March 18, 1942, shall enter any such War Relocation Project Area except upon written authorization executed by or pursuant to the express authority of this headquarters first obtained, which said authorization shall set forth the effective period thereof and the terms and conditions upon and purposes for which it has been granted.

"(e) Failure of persons subject to the provisions of this Public Proclamation No. 8 to conform to the terms and provisions thereof shall subject such persons to the penalties provided by Public Law No. 503, 77th Congress, approved March 21, 1942, entitled 'An Act to Provide a Penalty for Violation of Restrictions or Orders with Respect to Persons Entering, Remaining in, Leaving, or Committing any Act in Military Areas or Zones.'

(Seal)

J. L. DeWitt,
Lieutenant General, U. S. Army,
Commanding.

CONFIRMED:
J. A. Ulio,
Major General
The Adjutant General."

[3] 7 F. R. 2165.

Appendix E

WRA FORM 258a
WAR RELOCATION AUTHORITY
Formerly at Tule Lake

WRA-258a
Project *Central Utah*
Date *August 16, 1943*

No. 29

List of Evacuees Granted Leave Clearance by the Director of the War Relocation Authority

Name	Family No.	Address	Occupation	Sex	Age
Endo, Mitsuye	27968	2916-C (Tule Lake Address)	Office clerk-typist	F	22

(Signed) .....
Assistant Director

This leave clearance is based on a consideration of Forms DSS 304A and WRA 126a, or upon Form WRA 126 Rev. A check of question 28 need not be made by the Project Director. Pursuant to a recommendation of the Japanese-American Joint Board, the Project Director may issue to these individuals indefinite leaves for the purpose of employment or residence in the Eastern Defense Command as well as in other areas, provided the provisions of Administrative Instruction No. 22, Revised, are otherwise complied with. The Provost Marshal General's Department of the War Department has determined that these individuals are not at this time eligible for employment in plants and facilities vital to the war effort.

Appendix F

WRA FORM 131

WRA-131

WAR RELOCATION AUTHORITY
NOTICE OF ACTION ON APPLICATION FOR LEAVE CLEARANCE

To Endo, Mitsuye
29-16-C
Newell, California

You are hereby notified that your application for leave clearance dated 2-19-43 has been considered by the Director, and he has instructed me that

.....x.....you are eligible to be entered on the list of those cleared for indefinite leave

.....*.....the following special conditions are to attach to any leave issued pursuant to such clearance:

.....your application for leave clearance has been denied because:

This notice does NOT authorize departure from the relocation center. A suitable application must be made separately at any time you wish to apply for leave.

8/23/43 (Signed).....
Date Project Director

*You are eligible for indefinite leave for the purpose of employment or residence in the Eastern Defense Command as well as in other areas; provided the provisions of Administrative Instruction No. 22, Rev., are otherwise complied with: **The Provost Marshal General's Dept. of the War Department has determined that you, Endo Mitsuye are not at this time eligible for employment in plants and facilities vital to the war effort.** (Emphasis ours.)

Appendix G

WAR RELOCATION AUTHORITY
APPLICATION FOR INDEFINITE LEAVE

Note: This application will not be accepted unless an application for leave clearance has been earlier filed on Form WRA-126, or accompanies this application.

Relocation Center.....
Family No.....
Center address .....

1. Name..... .....
(Last) (First) (Middle)

2. What is the purpose of the proposed leave?

3. If you plan to attend any educational institution, state its name and address:

Name Address

....

Has your leave been taken up with the National Student Relocation Council?

....
(Yes) (No)

4. Have you arranged for any employment?

....
(Yes) (No)

Name of employer: .....
Address of employer: .....
Occupation of employer: .....
Your prospective occupation: .....
Salary: $.....

Attach copy of letter from employer or other evidence of employment.

5. How much money are you starting out with? $..... Have you property providing an income? .... If so, state nature, amount (Yes) (No) and what arrangements have been made for management or conservation of this property:

6. What arrangements have been made to meet your expenses while on leave? If you have not arranged for employment (as specified in 4 above) or for your subsistence at an educational institution, attach proof that you have adequate means of support.

Upon arrival at the first destination of this leave, I undertake within 24 hours to report to the Director of the War Relocation Authority in Washington, D. C., my arrival, and to confirm my business or school and residential addresses. In case of any change of school, employment, or residence, I will give prompt notice of such change.

....

(Date) (Signature)

Appendix H

REGULATIONS.

EXCERPTS FROM REGULATIONS GOVERNING ISSUANCE OF LEAVE FOR DEPARTURE FROM A RELOCATION AREA (7 F. R. 7656)

Pursuant to the provisions of Executive Order No. 9102 of March 18, 1942, the following regulations are hereby prescribed:

* * * * * * *

§5.1 Types of leave. Leaves are of the following types:

(a) A short term leave, for not more than thirty days, for attending to affairs requiring the applicant's presence outside the relocation area;

(b) A leave to participate in a work group, for employment and residence with a group of center residents outside the relocation area, or for such employment with residence remaining within the relocation area; and

(c) An indefinite leave, for employment, education or indefinite residence outside the relocation area.

§5.2 Application for leave. Any person residing within a relocation center who has been evacuated from a military area or who has been specifically accepted by the War Relocation Authority for residence within a center may apply for leave.

§5.3 Proceedings upon application for leave. (a) The Project Director may interview an applicant for leave, shall secure a completed individual record on form WRA-26 for the applicant, and shall secure such further information concerning the applicant and the proposed leave as may be available at the relocation center.

* * * * * * * *

(d) The file on each application for indefinite leave, which shall include the application, all related papers, and the Project Director's findings and recommendations, shall be forwarded by the Project Director to the Director. * * *

(e) In the case of each applicant for indefinite leave, the Director, upon receipt of such file from the Project Director, will secure from the Federal Bureau of Investigation such information as may be obtainable, and will take such steps as may be necessary to satisfy himself concerning the applicant's means of support, his willingness to make the reports required of him under the provisions of this part, the conditions and factors affecting the applicant's opportunity for employment and residence at the proposed destination, the probable effect of the issuance of the leave upon the war program and upon the public peace and security, and such other conditions and factors as may be relevant. The Director will thereupon send instructions to the Project Director to issue or deny such leave in each case, and will inform the Regional Director of the Instructions

so issued. The Project Director shall issue indefinite leaves pursuant to such instructions.

(f) A leave shall issue to an applicant in accordance with his application in each case, subject to the provisions of this part and under the procedures herein provided, as a matter of right, where the applicant has made arrangements for employment or other means of support, where he agrees to make the reports required of him under the provisions of this Part and to comply with all other applicable provisions hereof, and where there is no reasonable cause to believe that applicant cannot successfully maintain employment and residence at the proposed destination, and no reasonable ground to believe that the issuance of a leave in the particular case will interfere with the war program or otherwise endanger the public peace and security.

(g) The Director, the Regional Director, and the Project Director may attach such special condition to the leave to be issued in a particular case as may be necessary in the public interest. The special conditions to be so attached shall be governed by regulations or instructions issued from time to time. Every leave issued under the provisions of this Part shall state the conditions that are applicable thereto.

* * * * * * *

(l) The Project Director shall promptly notify the Regional Director and the Director of the names of any persons who have failed to return to the relocation center upon expiration of leave.

* * * * * * *

§ 5.5 Transportation and reports during leave. (a) The Project Director shall provide transportation for the applicant to whom a leave has been issued to the most convenient railroad or bus station. All other necessary transportation shall be arranged for by the applicant and shall not be paid for by the War Relocation Authority. The Authority may, however, make arrangements with employers for transportation connected with group work leave. * * *

(b) * * * Every indefinite leave shall require the person to whom such a leave has been issued to report his arrival, his business or school and residential addresses, and every change of address, to the Director. Reports of changes of addresses shall be required to be made, so far as possible, before leaving any employment, institution or address. The person to whom an indefinite leave has been issued shall further be required to report upon arrival at a new location, and to transmit any further appropriate information concerning his exact business, school and residence addresses promptly upon ascertaining them. The Project Director shall send to the Director reports of all such information received by him.

* * * * * * * *

§5.8 Restrictions on leave. * * *

(b) An indefinite leave may permit travel unlimited except as to restrictions imposed by military authorities with reference to military areas or zones, or may permit only travel within designated states, counties, or comparable areas.

(c) Whenever the military authorities of the United States require a pass or other authorization to enter any designated area, no leave shall be issued under the provisions of this part to permit entry into such area until the required pass or authorization has been obtained for the applicant. Whenever such military authorities impose restrictions on movement or conduct within any area, the continuance of such leave shall be contingent upon the observance of any such restrictions in addition to the observance of the other conditions of such leave.

§5.9 Expiration of leave and furlough. (a) Any leave issued, and the furlough granted in connection therewith, under the provision of this part, shall expire:

(1) On the expiration date stated in the leave; or

(2) At any time that the person to whom the leave has been issued shall violate any of the conditions applicable to such leave; or

(3) Upon notice from the Director or Project Director that the leave is revoked pursuant to the provisions of paragraph (b) of this section.

(b) The Director may revoke any leave when conditions are so far changed, or when such additional information has become available, that an original application by such person for leave would be denied under the provisions of this part. The Project Director may, on similar ground with the prior approval of the Regional Director, revoke any short term leave. When the Director shall revoke a leave, he will

promptly notify the Regional Director and the Project Director. When a Project Director shall revoke a leave, he shall promptly notify the Director and the Regional Director.

(c) Upon the expiration of any leave issued under this part, the person to whom the leave was issued shall return to the relocation center in which he previously resided unless new leave has been granted or unless he is otherwise directed by the Director.

EXCERPTS FROM REVISED REGULATIONS OF WAR RELOCATION AUTHORITY DATED JANUARY 1, 1944 (9 F. R. 154)

Pursuant to the provisions of Executive Order No. 9102 of March 18, 1942, Part 5, Chapter I, Title 32 of the Code of Federal Regulations is hereby revised to read as follows:

* * * * * * *

Sec. 5.1 *Types of leave.* Leaves are of the following types:

(a) A short term leave, for not more than sixty days, for attending to affairs requiring the applicant's presence outside the relocation area;

(b) A seasonal work leave, for seasonal employment and residence outside the relocation area; and

(c) An indefinite leave, for indefinite employment, education, or residence outside the relocation area.

Sec. 5.2 *Application for leave.* Any person residing within a relocation center who has been evacuated from a military area or who has been specifically accepted by the War Relocation Authority for residence within a relocation center may apply for leave. No such person shall depart from a relocation area before receiving leave.

Sec. 5.3 *Proceedings upon application for leave.* (a) Short term leaves, seasonal work leaves, and indefinite leaves may be issued by the Project Director in accordance with the provisions of this part, as supplemented by instructions issued by the Director from time to time.

(b) Except as may otherwise be determined by the Director, every person eligible to apply for leave who is 17 years of age or older shall file an application for leave clearance before he shall be eligible for leave. After such investigation as may be prescribed by instructions issued by the Director, the Project Director shall forward the application to the Director with his recommendations. The Director will secure from the Federal Bureau of Investigation such information as may be obtainable and will take such additional steps as may be necessary to determine the probable effect of the issuance of indefinite leave to the applicant upon the war program and upon the public peace and security. The Director will thereupon approve or disapprove the application and instruct the Project Director accordingly. A person whose application for leave clearance is disapproved shall be ineligible to receive indefinite leave and shall be transferred to the Tule Lake Center in northern California. A person resident at the Tule Lake Center whose application for leave clearance is approved shall be transferred to another center.

(c) Indefinite leave may be issued prior to approval of an application for leave clearance only in accordance with instructions issued by the Director from time to time. In the case of each application for indefinite leave, the Director will cause such steps to be taken as may be necessary to satisfy himself concerning the applicant's willingness to make the reports required of him under the provisions of this Part, his means of support, the conditions and fac-

tors affecting his successful maintenance of residence at the proposed destination, the probable effect of the issuance of the leave upon the war program and upon the public peace and security, and such other conditions and factors as may be relevant. The Director will issue instructions covering the issuance or denial of indefinite leave in each such case. The Project Director shall issue or deny indefinite leaves pursuant to such instructions.

(d) A leave shall issue to an applicant in accordance with his application in each case, subject to the provisions of this Part and under the procedures herein provided, as a matter of right, where the applicant agrees to make the reports required of him under the provisions of this Part and to comply with all applicable provisions hereof, where there is no reasonable cause to believe that he will not have employment or other means of support or that he cannot otherwise successfully maintain residence at the proposed destination, and where there is no reasonable cause to believe that the issuance of leave in the particular case will interfere with the war program or otherwise endanger the public peace and security.

(e) Such special conditions may be attached to the leave to be issued in a particular case as may be necessary in the public interest. The special conditions to be so attached shall be governed by instructions issued from time to time. Every leave issued under the provisions of this Part shall state the conditions that are applicable thereto.

(f) The Project Director shall promptly notify the applicant of the approval or disapproval of an application for leave or leave clearance, and of any special conditions attached to the approval of an application for leave, with a statement of the reasons therefor. In the case where the application for leave has been disapproved, or has been approved subject to special conditions, the Project Director shall advise the applicant of his right to appeal under the provisions of Sec. 5.4.

* * * * * * *

(h) The Project Director shall promptly notify the Director of the names of any persons who have failed to return to the relocation center upon expiration of leave.

* * * * * * *

Sec. 5.5 *Leave Assistance; reports during leave.* (a) The Project Director shall provide transportation for the applicant to whom a leave has been issued to the most convenient railroad or bus station. Assistance in meeting transportation costs to destination and initial subsistence expenses may be provided, in accordance with instructions issued by the Director from time to time, to persons to whom indefinite leave has been granted.

(b) * * * Each applicant for indefinite leave shall be required to agree to notify the Director promptly of his arrival at destination, his business or school and residential addresses, and all subsequent changes in school, employment, or residence.

* * * * * * *

Sec. 5.7 *Restrictions on leave.* * * *

(b) An indefinite leave may permit travel unlimited except as to restrictions imposed by military authorities with reference to military areas or zones, or may permit only travel within designated states, counties, or comparable areas.

(c) Whenever the military authorities of the United States require a pass or other authorization to enter any designated area, no leave shall be issued under the provisions of this Part to permit entry into such area until the required pass or authorization has been obtained for the applicant. Whenever such military authorities impose restrictions on movement or conduct within the area, the continuance of such leave shall be contingent upon the observance of any such restrictions in addition to the observance of the other conditions of such leave.

Sec. 5.8 *Expiration of leave.* (a) Any leave issued under the provisions of this Part shall expire:

(1) On the expiration date stated in the leave; or

(2) On the return to a relocation center, as a resident, of the person to whom the leave has been issued; or

(3) At any time that the person to whom the leave has been issued shall violate any of the conditions applicable to such leave; or

(4) On notice from the Director, the Project Director, or the Relocation Supervisor that the leave is

revoked pursuant to the provisions of paragraph (b) of this section.

(b) The Director may revoke any leave when conditions are so far changed, or when such additional information has become available, that an original application by such person for leave would be denied under the provisions of this Part. The Project Director may revoke any short term leave and the Relocation Supervisor may revoke any seasonal work leave on similar grounds. When the Project Director or Relocation Supervisor revokes a leave he shall promptly notify the Director.

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RULES OF PROCEDURE AND FORMS OF WAR RELOCATION AUTHORITY.

War Relocation Authority's Administrative Instruction No. 22

WAR RELOCATION AUTHORITY
WASHINGTON

July 20, 1942

ADMINISTRATIVE INSTRUCTION No. 22

Subject: Temporary procedure for issuance of permits to individuals or single families to leave relocation centers for employment outside such centers and the Western Defense Command.

This Instruction applies only to the issuance of permits to individuals or single families to leave relocation centers for employment outside such centers and outside the Western Defense Command. It does not

apply to such outside employment for groups of evacuees; in the case of such groups, present procedures may continue to be followed.

The program of outside employment will be further developed as we accumulate experience.

1. Any American citizen of Japanese ancestry within a relocation center, who has never at any time resided or been educated in Japan, may apply to the Project Director for a permit to leave the center for employment outside the center and outside the Western Defense Command.

2. The applicant for a permit must show that he has a specific job opportunity with a prospective employer at a designated place outside the relocation center and outside the Western Defense Command. If the applicant has dependents, he must state what arrangements will be made for the dependents who are to accompany him and for those who are to remain in the center. Preference will be given by the Director to applications for leave to accept employment within the Middle West.

3. The Project Director will promptly investigate as thoroughly as practicable each applicant who applies for a permit, through interviews with the applicant and those who know him or have information about him, and by other suitable means. The Project Director will then forward to the Regional Director the application and all related papers. * * *

4. The Regional Director, upon receipt of an application for a permit, will obtain from the Federal

Bureau of Investigation any information or record it can supply regarding the applicant or his family, and will make such further investigation in connection with the application as may be necessary. The Regional Director will then forward to the Director the application and all related papers, together with a full report of his findings and recommendations thereon.

5. Each application for a permit will be approved or disapproved by the Director. * * *

6. When the Project Director is advised of the approval of an application for a permit, he will issue a permit to the applicant. The permit will show * * * any special conditions upon which the permit is issued; will state that the permittee is required to notify the Director of the War Relocation Authority of any change of employer or change of address * * *.

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9. Every applicant issued a permit pursuant to this Instruction, and his accompanying dependents, will remain in the constructive custody of the military commander in whose jurisdiction lies the relocation center in which the applicant resides at the time the permit is issued. Any such permit may be revoked at any time upon the order of the Director, and the applicant and any dependents accompanying him may be required to return to the relocation center or such other place as the Director specifies, if the Director shall find such revocation to be necessary in the public interest.

10. This Instruction applies only to relocation centers which have been designated military areas pursuant to Executive Order No. 9066 of February 19, 1942.

/s/ D. S. Myer,
Director

Excerpts from War Relocation Authority's Administrative Instruction No. 22, Revised, issued November 6, 1942.

I. INTRODUCTION.

A. *Statement of Purpose.* The issuance of leave for departure from a relocation area is governed by the regulations issued by the Director on that subject, published in the Federal Register, September 29, 1942, title 32, ch. 1, pt. 5. This Administrative Instruction is issued for the purpose of specifying in greater detail the procedure to be followed under those regulations. This Instruction does not alter the regulations. All administrative action with reference to leave shall be taken with due regard to both the regulations and this Instruction.

* * * * * * *

IV. INDEFINITE LEAVE.

A. *Execution of Application.* Unless an applicant for an indefinite leave has already executed Form WRA-126, for leave clearance, he shall be required to execute that form in duplicate in connection with his application for indefinite leave. * * *

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D. *Transmission of Application to Director.* When the Project Director is satisfied that the file of the case contains all the relevant information more acces-

sible from the project than from Washington, he shall transmit to the Director the application for indefinite leave, Form WRA-130, and the project investigation record. * * *

E. *Director's Investigation and Ruling.* The Director, upon receipt of such file from the Project Director or the employment investigator, will investigate the applicant's prospective employment or other means of support and the conditions and factors affecting the applicant's proposed residence. If the applicant has not previously obtained leave clearance, the Director will conduct the further investigation described in Section V, Paragraph G of this Instruction. Where a considerable time has elapsed since the applicant secured a leave clearance, the Director will take such measures as he deems appropriate to bring down-to-date the investigation pertinent thereto. * * *

V. LEAVE CLEARANCE.

A. *Application* An application for leave clearance * * * must be filed, either before or simultaneously with, an application for indefinite leave or an application for leave to participate in a work group. Any evacuee wishing to obtain leave clearance and have his references checked, so that a subsequent application for leave of any type may be expeditiously processed, may file an application for leave clearance. * * *

B. *Examination of Applicant.* Upon the execution of the application for leave clearance, Form WRA-126, the Project Director shall interview the

applicant, shall elicit any information necessary to check or to complete the answers, and shall complete and correct the answers accordingly. He shall pursue any further line of questions that seem pertinent if he has any doubt concerning the frankness of the intentions of the applicant. Any further pertinent information elicited suitable for certification by the applicant's signature shall be written on to the form or stapled thereto. If sheets in addition to the printed form are used, the applicant shall be asked to sign those sheets separately. Separate applications shall be filed and fully processed for applicant's wife and for each dependent 17 years of age or over whom it is proposed to have accompany the applicant.

C. *Investigation on Project.* The Project Director shall make such further investigation as may be practical to verify and supplement at the project the information supplied by the applicant. This shall include a check with the Internal Security Officer of the project and may include interviews with any reference the applicant gives and interviews with persons with or for whom the applicant has worked, so far as any of such references or other people are on or accessible from the project for personal interviews. He shall send out to all other references given by the applicant a franked envelope addressed to the Director in Washington and a form letter, WRA-138, which requests a reply to be sent to the Director in Washington. He shall embody in a project investigation record any material information not certified by the applicant's signature.

D. *Recommendations by Project Director.* The Project Director shall then recommend the disposition to be made of the application for leave clearance—which may be either allowed, disallowed, or allowed with special conditions. Unless he deems the applicant entitled to clearance without doubt, he shall state reasons for the recommendation made. It will be recognized that in many instances these recommendations will be made upon only incomplete evidence, but they are to be recorded for consideration with such evidence as may be developed by subsequent investigation. These reasons may be stated briefly or at length, according to the circumstances, but in any case the significant facts shall be referred to and identified by their location on Form WRA-126 or by the page number of the project investigation record.

E. *Investigation Outside Project.* When the case suggests a need for further investigation concerning particular matters, such as addresses, ship manifests, or organizations, which cannot be investigated on the project, the project investigation record shall call particular attention to these matters and shall list them together with any available leads for further investigation.

F. *Transmission of Papers.* When the Project Director is satisfied that the file on the application contains all the relevant information more accessible from the project than from Washington, he shall transmit the Individual Record, Form WRA-26, in quadruplicate, and one copy of the application for leave clearance, the project investigation record, and

his findings and recommendations, to the Director. He shall retain a copy of these papers. At the same time, he shall send the Regional Director a copy of applicant's Form WRA-26 and a statement of the recommendation made by him. When an applicant is likely to be accompanied by members of his family or other dependents 17 years of age or older, a full set of such papers shall be transmitted for each such family member or dependent. Forms WRA-26 for children under seventeen should accompany Form WRA-126, whenever possible. If they do not accompany Form WRA-126 they shall be transmitted along with an application for indefinite leave as specified in Section IV, Paragraph D.

G. *Director's Investigation and Ruling.* The Director, upon receipt of such file from the Project Director or employment investigator, will secure from the Department of Justice such information as may be obtainable, will examine any letters received from applicant's references, and will take such steps as may be necessary to satisfy himself concerning the probable effect upon the war program and upon the public peace and security of issuing indefinite leave to applicant. The Director will thereupon instruct the Project Director whether applicant is eligible to be entered upon the register of those cleared for indefinite leave, and whether any special conditions are to attach to any leave issued pursuant to such clearance, and will inform the Regional Director of such instructions in each case. The Director will further advise the Project Director of the reasons for denying

such clearance or for directing that such conditions attach to any leave issued pursuant thereto. He will assign such reason or reasons in the language of paragraph 5.3 (f) of the leave regulations.

Excerpts from War Relocation Authority's Handbook on Issuance of Leave for Departure from a Relocation Center issued July 20, 1943.

60.1 The issuance of leave for departure from a relocation area is governed by the regulations issued by the Director on that subject, published in the Federal Register, September 29, 1942, title 32, c. 1, pt. 5, as amended. This Handbook is issued for the purpose of specifying in greater detail the procedure to be followed under those regulations. This Handbook does not alter the regulations. All administrative action with reference to leave shall be taken with due regard to both the regulations and this Handbook. Statement of Purpose

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60.4.3 In cases where the applicant meets the following eligibility requirements:

A. He has previously received leave clearance pursuant to an application filed either on DSS Form 304A and Form WRA-126a, or on Form WRA-126, Revised (notice of such leave clearance will be given on Forms WRA 258, 258a, and 258b), and the Project Director believes there is no need for the Director to bring the leave clearance investigation down to date.

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The Project Director, without further authority from the Director, may issue the leave on the appro-

priate form (WRA-137, WRA-137a, or WRA-138) under any one of the following circumstances:

C. The applicant proposes to accept an employment offer or offer of support that has been referred to the Project Director by a Relocation Officer, or that has been investigated and approved by a Relocation Officer at the request of the Project Director.

D. The applicant does not intend to work, but has adequate financial resources to take care of himself and a Relocation Officer has investigated and approved public sentiment at his proposed destination.

E. The applicant has made arrangements to live at a hotel or in a private home approved by a Relocation Officer while arranging for employment.

F. The applicant proposes to go to a given area pursuant to a notice from the Relocation Officer to the Project Director to the effect that the Relocation Officer can place a certain number of evacuees in a given area within a given time. This notice will describe the types of jobs that are available, including all pertinent information relating to wages, housing, cost of living, and community relations affecting evacuees. Relocation Officers shall take care not to encourage several projects to send competing groups for the same positions and it shall be the duty of Project Directors to notify the Relocation Officer of any and all leaves contemplated in response to such a notice of vacancies, in order that the Relocation Officer may keep the supply adjusted to the demand for evacuees.

* * * * * * *

H. The applicant proposes to accept an employment offer by a Federal, State, or local governmental agency.

I. The applicant proposes to attend a college, university, or professional school on the approved list, has evidence (obtained through the National Student Relocation Council or otherwise) that he has been admitted to the school, and has sufficient funds or a reasonably certain opportunity for part time employment to enable him to finish one quarter or semester of work. Leave may be granted under this subparagraph only if the applicant has received leave clearance pursuant to a notice from the Director on Form WRA-258a or 258b indicating that the application has been considered by the Japanese-American Joint Board in the Provost Marshal General's Department.

* * * * * * *

J. The applicant is a parent going to live with a son or daughter.

K. The applicant is a son or daughter going to live with one or both parents.

L. The applicant is a wife going to live with her husband, or is a husband going to live with his wife.

M. The applicant is going to live with a brother or sister.

N. The applicant is a dependent going to live with a person who will support him.

O. The applicant proposes to marry a person living outside a Relocation Center and live with him or her, as the case may be.

P. The applicant is away from the project on seasonal work leave and has been recommended by the appropriate Relocation Officer for indefinite leave (see Section 60.7.3). It is not necessary for the applicant to show that he has made arrangements for employment at his destination.

No leave shall be issued under the provisions of this paragraph to an applicant whose proposed place of residence or employment is within the Eastern Defense Command unless leave clearance has been approved by the Director on Forms WRA-258a or WRA-258b, or unless the notice of leave clearance specifically authorizes entry into the Eastern Defense Command.

No conditions shall be attached to the leave so issued unless they have previously been approved by the Director. When issuing the indefinite leave under Paragraphs G through N above, it shall be the responsibility of the Project Director to determine that the applicant has employment or other means of support at his destination, and the applicant should be informed that no check has been made of local sentiment at his destination. If the applicant wants such check to be made, the Project Director shall ask the appropriate Relocation Officer to make it. When an indefinite leave is issued under this paragraph, the Project Director shall immediately send to the Director in accordance with Section 60.4.5 of this Handbook, a copy of Form WRA-130 completely filled out with the notation: "Indefinite leave has been issued under Section 60.4.3, Paragraph ....., of the Adminis-

trative Handbook on Issuance of Leave." If the Director should subsequently deny an application for leave clearance by an applicant who has been granted indefinite leave under the provisions of this paragraph, appropriate instructions with respect to the indefinite leave will be issued to the Project Director. If the Project Director should receive a notice that, leave clearance has been denied without such instructions, he shall request them by wire.

* * * * * * *

Transmission of Application to Director.

60.5. Whether or not a case is within the special provisions of Section 60.4.3 or 60.4.4, the Project Director, when satisfied that the file of the case contains all the relevant information more accessible from the project than from Washington, shall transmit to the Director the application for indefinite leave, Form WRA-130, and the project investigation record. He shall also comply with the provisions of Section 60.6 of this Handbook with reference to any accompanying application for leave clearance. * * *

Director's Investigation and Ruling

60.6. Upon receipt of such file from the Project Director, the Director will take such further steps as may be required to review the action of the Project Director or to make his own ruling. If the Project Director has not granted indefinite leave, the Director will investigate the applicant's prospective employment or other means of support and the conditions and factors affecting the applicant's proposed residence. If the applicant has not previously obtained leave clearance, the Director will conduct the further investigation described in Section 60.6.6 of this Hand-

book. Where a considerable time has elapsed since the applicant secured a leave clearance, the Director will take such measures as he deems appropriate to bring down-to-date the investigation pertinent thereto. Upon completing the investigation appropriate in any case where leave has not been granted by the Project Director, the Director will instruct the Project Director to issue or to deny indefinite leave, or to issue such leave on special conditions.

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60.6.1. Every evacuee who has reached or who hereafter reaches his seventeenth birthday shall file an application for leave clearance. Application for leave clearance must accompany or precede an application for short term, seasonal work, or indefinite leave. * * *

.2. The Project Director shall make such investigation as may be practical to verify and supplement at the project the information supplied by the applicant. This shall include a check with the Internal Security Officer of the project and may include interviews with any reference the applicant gives and interviews with persons with or for whom the applicant has worked, so far as any of such references or other people are on or accessible from the project for personal interviews. He shall embody in a project investigation record any material information not certified by the applicant's signature. He shall send out to all other references given by the applicant a franked envelope addressed to the Director in Wash-

ington and a form letter, WRA-140, which requests a reply to be sent to the Director in Washington. * * *

3. The Project Director shall then recommend the disposition to be made of the application for leave clearance—which may be either allowed, disallowed, or allowed with special conditions. Unless he deems the applicant entitled to clearance without doubt, he shall state reasons for the recommendation made. * * *

4. When the case suggests a need for further investigation concerning particular matters, such as addresses, ship manifests, or organizations, which cannot be investigated on the project, the project investigation record shall call particular attention to these matters and shall list them together with any available leads for further investigation.

5. When the Project Director is satisfied that the file on the application contains all the relevant information more accessible from the project than from Washington, he shall transmit to the Director five copies of the Individual Record, Form WRA-26, three copies of the application for leave clearance, Form WRA-126, Revised, and one copy of the project investigation record and his findings and recommendations. * * *

6. * * * Upon receipt of such forms or upon receipt of the papers transmitted from the projects pursuant to this Section 60.6.5, the Director will obtain from the Department of Justice such information as may be obtainable, will examine any letters received from applicant's references, and will take such steps as may be necessary to satisfy himself concerning the

probable effect upon the war program and upon the public peace and security of issuing indefinite leave to applicant. He will thereupon instruct the Project Director whether applicant is eligible for indefinite leave for the purpose of employment or residence anywhere in the United States except prohibited military areas, whether any subsequent application for indefinite leave involving residence or employment in the Eastern Defense Command must be submitted to the Director, whether the Provost Marshal General's Department has determined that the applicant is eligible for employment in plants and facilities vital to the war program, and whether any special conditions are to attach to any leave issued pursuant to such clearance. Forms WRA-258, 258a, and 258b will be used for this purpose. * * *

.7. The Project Director will enter these instructions in the applicant's leave file and make suitable entry upon the register of those eligible for indefinite leave. He shall also notify the applicant on Form WRA-131, Revised, of the disposition of this application for leave clearance. * * *

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60.10.1. This section supplements Section 60.6.6 of this Handbook by prescribing procedures to be followed in the case of applications for leave clearance that present difficult problems of clearance because the files do not clearly indicate eligibility for indefinite leave.

.2. In each case in which the Director determines that the facts submitted do not clearly indicate the applicant's eligibility for leave clearance, the file or

suitable parts thereof, including the application and all information available to the Director about the applicant, will be returned to the center at which the applicant then resides, or last resided, for further investigation. Some files will be completely analyzed before they are returned and the analysis will indicate the factors requiring further investigation. This procedure will usually be followed when the file contains a derogatory intelligence report. Most other files, however, will be returned under Form WRA-261 without a complete analysis. For example, this action will be taken in cases where the Joint Board does not recommend, or is not expected to recommend, that leave clearance be granted; the files will be returned without complete analysis in order to expedite further consideration by the Project Director. Such files must be examined at the project in order to determine which of the factors listed below are present. All of the factors that occur in a particular file must be adequately covered by the further investigation provided for in Section 60.10.5-C, because each of them throws some doubt on eligibility for leave clearance. Any one of the first nine factors listed below (A through I) is regarded by intelligence agencies as sufficient to warrant a recommendation that leave clearance be denied unless there is an adequate explanation. One function of the investigation is to determine whether an adequate explanation exists. Particular care must be taken to cover these factors thoroughly in the investigation. The remaining factors are of lesser importance but must also be covered by the investigation, since in combination

they may present a case in which leave clearance should be denied. The factors are listed as follows:

A. A negative answer to question 28 of the application whether or not subsequently changed either during or after the registration.

B. Failure to answer question 28.

C. A late registration during the special registration in February and March.

D. A request for repatriation or expatriation whether or not subsequently retracted.

E. Military training in Japan. (It is assumed that men have received military training—Gunji Kyoren—if they received any of their education in Japan after the age of 15 and returned to the United States after 1930.)

F. Employment on Japanese naval vessels.

G. Three trips to Japan after the age of six, except in the case of seamen whose trips were confined to ports of call.

H. Ten years residence in Japan by a male citizen of the United States after the age of six, unless he is married to a citizen of the United States and has children.

I. An officer, organizer, agent, member, or contributor to any of the organizations on list "A", which intelligence agencies consider to be organizations known to be subversive. This list will be furnished in a restricted memorandum.

J. An officer, organizer, agent, member or contributor to any of the organizations on list "B",

which intelligence agencies consider potentially or mildly subversive. This list will also be furnished in a restricted memorandum.

K. A qualified answer to question 28 that raises a substantial doubt about loyalty.

L. Attendance at Japanese language school beyond high school age, which is assumed for this purpose to be 14.

M. Trips to Japan (the trips are regarded as most significant if made for a Japanese firm).

N. Residence in Japan.

O. Education in Japan.

P. Marriage to a Japanese alien in the case of American citizens.

Q. Employment by a Japanese governmental agency or a semi-official company.

R. Employment by any of the business enterprises on list "C", which intelligence agencies say have had at least semi-official connections with the Japanese government or have engaged in subversive activities in the United States. This list will be furnished in a restricted memorandum.

S. Employment as a Japanese language school instructor.

T. Shinto religion.

U. Investments in Japan.

V. An answer to question 27 on the application qualified to indicate an unwillingness to fight in the Pacific.

W. Misrepresentations of fact when filling in application.

X. A bad project record.

Y. Derogatory intelligence report about the individual.

Z. Derogatory intelligence report about close relatives.

AA. Close relatives are interned or paroled.

BB. Close relatives are members of organizations listed above in paragraph "I".

CC. Close relatives, particularly males, are ~~living~~ in Japan (not much significance is attached to married females living in Japan).

DD. Close relatives have asked for repatriation.

EE. Close relatives have answered question 28 in the negative.

FF. Close relatives who are citizens of the United States have lived in Japan for extended periods of time or have received most of their education in Japan.

GG. Close relatives have investments in Japan.

60.13:1. It is the policy of the War Relocation Authority to assist evacuees ~~to~~ whom indefinite leave has been granted (except when the leave is primarily for the purpose of attending a college or university) in meeting costs of transportation and initial subsistence expenses where this is necessary in order to enable any evacuee to establish himself and his family

in the community to which he is going. Assistance will be given only once and will ordinarily be given only when indefinite leave is first issued. An evacuee who has been granted indefinite leave without receiving assistance, and who then returns to the center and leaves a second time will be given no assistance when he leaves the second time, unless his return to the center was on the recommendation of a Relocation Officer, and the Project Director in the exercise of his discretion concludes that by reason of special circumstances a leave assistance grant is proper.

Amount Assista

2. * * * The *maximum of assistance* will be coach fare for each member of the family, plus $3.00 per person per day of travel for meals en route, plus five dollars per day for five days ($25.00) for each member of the family, the latter sum being designed to meet initial subsistence expenses at the place of destination. This maximum of assistance shall be given in all cases in which the family's resources in cash amount to $100 per family member, or less. * * *